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Supreme Court, U.S.
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IN THE

SUPREME COURT OF THE UNITED STATES

TERM. 197 78-1832

NO. ____

JULIUS T. CUYLER, SUPERINTENDENT

AND

DISTRICT ATTORNEY OF PHILADELPHIA,
PETITIONER

V.

JOHN SULLIVAN, RESPONDENT

PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF
APPEALS FOR THE THIRD CIRCUIT

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INDEX

	Page
Opinions Below	1-2
Jurisdiction	2
Questions Presented	2-3
Constitutional Provisions Involved	3-4
Statutory Provision Involved	4-5
Statement of the Case	6-12
Reasons for Granting the Writ	13-33
I. The Sixth Amendment standard of review utilized by the Court of Appeals for the Third Circuit in determining conflicts of interests for defense attorneys in state criminal trials is inconsistent with standards enunciated by every other Court of Appeals and finds no support in the prior decisions of this Court.	13-19
II. Even assuming that the standard of review applied below is constitutionally mandated when court appointed counsel represents two or more defendants at the same trial, the circumstances presented herein, namely the representation of respondent and his separately tried co-defendants by two privately retained attorneys, compels the use of a different standard of review under the Sixth Amendment.	20-28
III. The Court below violated settled principles of habeas corpus review, as determined by this Court and Congress, by ignoring the factual determinations of the state courts, and substituting its own findings for those of the state courts and the District Court.	29-33
Conclusion	34

Page

APPENDICES TO THE BRIEF

Appendix A: Order of the Court of Appeals for the Third Circuit denying petition for rehearing in banc, with dissenting opinion

Appendix B: Opinion of the Court of Appeals granting writ of habeas corpus

Appendix C: Opinion of the District Court, incorporating in part and rejecting in part the report and recommendation of the United States Magistrate

Appendix D: Opinion of the Pennsylvania Supreme Court denying post conviction relief

Appendix E: Opinion of the Pennsylvania Supreme Court affirming judgment of sentence

Appendix F: Opinion of the Court of Common Pleas denying post conviction relief

TABLE OF CITATIONS

FEDERAL CASES	PAGE
ARGERSINGER v. HAMLIN, 407 U.S. 25, 92 S. CT. 2006 (1972)	23
AUSTIN v. ERICKSON, 477 F.2D 620 (8TH CIR. 1973)	18
AVERY v. STATE OF ALABAMA, 308 U.S. 444, 60 S. CT. 321 (1940)	23
BERAN v. UNITED STATES, 580 F.2D 324 (8TH CIR. 1978), CERT. DENIED, ___ U.S. ___, 99 S. CT. 1422 (1979)	18
CRAIG v. UNITED STATES, 217 F.2D 355 (6TH CIR. 1954)	26
DAVIDSON v. CUPP, 446 F.2D 642 (9TH CIR. 1971)	17
FITZGERALD v. ESTELLE, 505 F.2D 1334 (5TH CIR.), CERT. DENIED, 422 U.S. 1011 (1975)	24
FOXWORTH v. WAINWRIGHT, 516 F.2D 1072 (5TH CIR. 1975)	17
FRYAR v. UNITED STATES, 404 F.2D 1071 (10TH CIR. 1968), CERT. DENIED, 395 U.S. 964, 89 S. CT. 2109 (1969)	17
GARTON v. SWENSON, 497 F.2D 1137 (8TH CIR. 1974)	26
GLASSER v. UNITED STATES, 315 U.S. 60, 62 S. CT. 457 (1942)	14,15
GIDEON v. WAINWRIGHT, 372 U.S. 335, 83 S. CT. 792 (1963)	23
GOODWIN v. CARDWELL, 432 F.2D 521 (6TH CIR. 1970)	26
HAGGARD v. STATE OF ALABAMA, 550 F.2D 1019, REHEARING DENIED, 554 F.2D 475 (5TH CIR. 1977)	16
HAWK v. OLSEN, 326 U.S. 271, 66 S. CT. 116 (1945)	23

TABLE OF CITATIONS

(CONTINUED)

FEDERAL CASES	PAGE
HOLLOWAY v. ARKANSAS, 435 U.S. 475, 98 S. CT. 1173 (1978)	14,15
HOUSE v. MAYO, 324 U.S. 42, 65 S. CT. 517 (1945)	23
KAPLAN v. BOMBARD, 573 F.2D 708 (2D CIR. 1978)	16
LARRY BUFFALO CHIEF v. STATE OF SOUTH DAKOTA, 425 F.2D 271 (8TH CIR. 1970)	26
LAVALLEE v. DELLE ROSE, 410 U.S. 690, 93 S. CT. 1203 (1973)	30
LOLLAR v. UNITED STATES, 376 F.2D 243 (D.C. CIR. 1967)	18,27
MARZULLO v. MARYLAND, 561 F.2D 540 (4TH CIR. 1977), CERT. DENIED, SUB NOM., MARYLAND v. MARZULLO, 435 U.S. 1011, 98 S. CT. 1885 (1978)	24
MCMANN v. RICHARDSON, 397 U.S. 759, 90 S. CT. 1441 (1970)	24
MILLER v. UNITED STATES, 564 F.2D 103 (1ST CIR. 1977), CERT. DENIED, 435 U.S. 931, 98 S. CT. 1504 (1978)	21
POWELL v. STATE OF ALABAMA, 287 U.S. 45 (1932)	23
SCHMIDT v. HEWITT, 573 F.2D 794 (3D CIR. 1978)	30
SCOTT v. ILLINOIS, ___ U.S. ___, 99 S. CT. 1158 (1979)	23
THACKER v. BORDENKIRCHER, 590 F.2D 640 (6TH CIR. 1979)	17
TOLLETT v. HENDERSON, 411 U.S. 258, 93 S. CT. 1602 (1973)	24
TOWNSEND v. SAIN, 372 U.S. 293, 83 S. CT. 745 (1963)	29,33

TABLE OF CITATIONS

(CONTINUED)

FEDERAL CASES	PAGE
UNITED STATES v. ALBERTI, 470 F.2D 878 (2D CIR. 1972), CERT. DENIED, 411 U.S. 919, 93 S. CT. 1557 (1973)	26
UNITED STATES v. ALVAREZ, 580 F.2D 1251 (5TH CIR. 1978)	25,26,27
UNITED STATES v. ATKINSON, 565 F.2D 1283 (4TH CIR. 1977), CERT. DENIED, ___ U.S. ___, 98 S. CT. 2845 (1978)	16
UNITED STATES v. BOSCH, 584 F.2D 1113 (1ST CIR. 1978)	26
UNITED STATES v. CARRIGAN, 543 F.2D 1053 (2D CIR. 1976)	16
UNITED STATES v. FOSTER, 469 F.2D 1 (1ST CIR. 1972)	16,26
UNITED STATES v. MANDELL, 525 F.2D 671 (7TH CIR. 1975), CERT. DENIED, 423 U.S. 1049, 96 S. CT. 774 (1976)	17
UNITED STATES v. MARSHALL, 488 F.2D 1169 (9TH CIR. 1973)	26
UNITED STATES v. WOODS, 544 F.2D 242 (6TH CIR. 1976), CERT. DENIED, 429 U.S. 1062, 97 S. CT. 1652 (1977)	17
UNITED STATES EX REL. DARCY v. HANDY, 203 F.2D 407 (3RD CIR.) (EN BANC), CERT. DENIED, 346 U.S. 865, 74 S. CT. 103 (1953)	23
UNITED STATES EX REL. FOYE v. STATE OF NEW JERSEY, 547 F.2D 217 (3D CIR. 1977)	33
UNITED STATES EX REL. GREEN v. RUNDLE, 434 F.2D 1112 (3D CIR. 1970)	23
UNITED STATES EX REL. HART v. DAVENPORT, 478 F.2D 203 (3D CIR. 1973)	23,24

TABLE OF CITATIONS

(CONTINUED)

FEDERAL CASES	PAGE
UNITED STATES EX REL. HAYWARD v. JOHNSON, 508 F.2D 322 (3D CIR.), CERT. DENIED, 422 U.S. 1011, 95 S. CT. 2637 (1975)	30
UNITED STATES EX REL. MCCLINDON v. WARDEN, ILL. ST. PEN., 575 F.2D 108, CERT. DENIED, 99 S. CT. 170 (1978)	17
UNITED STATES EX REL. MCNAIR v. STATE OF NEW JERSEY, 492 F.2D 1307 (3D CIR. 1974)	30,33
UNITED STATES EX REL. O'BRIEN v. MARONEY, 423 F.2D 865 (3D CIR. 1970)	23
UNITED STATES EX REL. ROBINSON v. HOUSEWRIGHT, 525 F.2D 988 (7TH CIR. 1975)	26
UNITED STATES EX REL. SULLIVAN v. CUYLER, 593 F.2D 513 (3D CIR. 1979)	8,13,21,27
UNITED STATES EX REL. WILKINS v. BANMILLER, 205 F. SUPP. 123 (E.D. PA. 1962), AFF'D, 325 F.2D 514 (3D CIR. 1963), CERT. DENIED, 379 U.S. 847, 85 S. CT. 87 (1964)	23
WALKINS v. WILSON, 408 F.2D 351 (9TH CIR. 1969)	17
WHITE v. BAGEN, 324 U.S. 760, 65 S. CT. 978 (1945)	23
PENNSYLVANIA CASES	
COMMONWEALTH v. SULLIVAN, 472 PA. 129, 371 A.2D 468 (1977)	2,7,11,12,
COMMONWEALTH v. SULLIVAN, 446 PA. 419, 286 A.2D 898 (1971)	2,7

TABLE OF CITATIONS

(CONTINUED)

	PAGE
CONSTITUTIONAL AND STATUTORY PROVISIONS	
UNITED STATES CONSTITUTION, AMENDMENT VI	3
UNITED STATES CONSTITUTION, AMENDMENT XIV, §1	3
28 U.S.C. §1254(1)	3
28 U.S.C. §2254(D)	4,29,30
ACT OF JANUARY 25, 1966, P.L. (1965) 1580, §1, 19 P.S. §1180-1 ET SEQ. (SUPPLEMENT 1978-1979)	7, 31
OTHER AUTHORITIES	
ABA STANDARDS RELATING TO THE ADMINISTRATION OF CRIMINAL JUSTICE, JOINDER AND SEVERENCE, §13-2.2 (2D CIR. 1978)	20
COMMENTS: CONFLICT OF INTEREST IN MULTIPLE REPRESENTATION OF CRIMINAL CO-DEFENDANTS, 68 J. CRIM. L. AND CRIMINOLOGY, 226 (1977)	14
GEER, REPRESENTATION OF MULTIPLE CRIMINAL DEFENDANTS: CONFLICTS OF INTEREST AND THE PROFESSIONAL RESPONSIBILITY OF THE DEFENSE ATTORNEY, 62 MINN. L.R. 119 (1977)	14
HYMAN, JOINT REPRESENTATION OF MULTIPLE DEFENDANTS IN A CRIMINAL TRIAL: THE COURT'S HEADACHE, 5 HOFSTRA L. REV. 315 (1977)	14
NOTE, ENSURING EFFECTIVE ASSISTANCE OF COUNSEL FOR THE CRIMINAL CO-DEFENDANT, 37 LA. L. REV. 1289 (1977)	15
WANAT, CONFLICTS OF INTEREST IN CRIMINAL CASES AND THE RIGHT TO EFFECTIVE ASSISTANCE OF COUNSEL - THE NEED FOR CHANGE, 10 RUT. - CAM. L. REV. 57 (1978)	15

IN THE

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JULIUS T. CUYLER, SUPERINTENDENT

AND

DISTRICT ATTORNEY OF PHILADELPHIA,
PETITIONER

V.

JOHN SULLIVAN, RESPONDENT

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

THE PETITIONER, DISTRICT ATTORNEY OF PHILADELPHIA, RESPECTFULLY PRAYS THAT A WRIT OF CERTIORARI ISSUE TO REVIEW THE JUDGMENT AND OPINION OF THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT ENTERED IN THE ABOVE-ENTITLED CASE ON FEBRUARY 14, 1979.

OPINIONS BELOW

THE ORDER OF THE COURT OF APPEALS DENYING PETITION FOR REHEARING IN BANC, JUDGES GARTH, ADAMS AND ROSENN DISSENTING, OFFICIALLY REPORTED AT 593 F.2D 512, 524 (3D CIR. 1979), IS SET OUT AS APPENDIX A. THE OPINION OF THE COURT OF APPEALS, OFFICIALLY REPORTED AT 593 F.2D 512 (3D CIR. 1979), IS SET

OUT AS APPENDIX B. THE UNREPORTED OPINION OF THE DISTRICT COURT FOR THE EASTERN DISTRICT OF PENNSYLVANIA, ADOPTING AND INCORPORATING IN PART THE REPORT AND RECOMMENDATION OF THE UNITED STATES MAGISTRATE, IS SET OUT AS APPENDIX C. THE OPINION OF THE SUPREME COURT OF PENNSYLVANIA DENYING POST CONVICTION RELIEF, REPORTED AS COMMONWEALTH V. SULLIVAN, 472 PA. 129, 371 A.2D 468 (1977), IS SET OUT AS APPENDIX D. THE OPINION OF THE SUPREME COURT OF PENNSYLVANIA, AFFIRMING THE JUDGMENT OF SENTENCE, REPORTED AS COMMONWEALTH V. SULLIVAN, 446 PA. 419, 286 A.2D 898 (1971), IS SET OUT AS APPENDIX E. THE UNREPORTED OPINION OF THE PHILADELPHIA COURT OF COMMON PLEAS DENYING POST CONVICTION RELIEF IS SET OUT AS APPENDIX F.

JURISDICTION

THE ORDER OF THE COURT OF APPEALS FOR THE THIRD CIRCUIT WAS ENTERED ON FEBRUARY 14, 1979. A PETITION FOR REHEARING IN BANC WAS TIMELY FILED AND DENIED ON MARCH 12, 1979. THIS PETITION FOR CERTIORARI WAS FILED WITHIN NINETY DAYS OF THE FINAL ORDER OF THE COURT OF APPEALS FOR THE THIRD CIRCUIT. THIS COURT'S JURISDICTION IS INVOKED UNDER 28 U.S.C. §1254(1)

QUESTIONS PRESENTED

I. IS THE SIXTH AMENDMENT RIGHT TO THE EFFECTIVE ASSISTANCE OF COUNSEL VIOLATED MERELY BY A DETERMINATION THAT A POSSIBLE CONFLICT OF INTEREST, HOWEVER REMOTE, MAY EXIST?

II. ASSUMING THAT THE ABOVE STANDARD IS COMPELLED UNDER THE SIXTH AMENDMENT IN CASES OF JOINT REPRESENTATION AND COURT-APPOINTED COUNSEL, IS THE SAME STANDARD OF REVIEW REQUIRED HEREIN, WHERE RESPONDENT AND HIS CO-DEFENDANTS WERE SEPARATELY TRIED AND REPRESENTED BY TWO PRIVATELY RETAINED ATTORNEYS?

III. DID THE COURT BELOW VIOLATE SETTLED PRINCIPLES OF HABEAS CORPUS REVIEW, AS ENUNCIATED BY THIS COURT AND CONGRESS, BY IGNORING THE FACTUAL DETERMINATIONS OF THE STATE COURTS AND SUBSTITUTING ITS FINDINGS FOR THOSE OF THE STATE AND DISTRICT COURTS?

CONSTITUTIONAL PROVISIONS INVOLVED

UNITED STATES CONSTITUTION, AMENDMENT SIX.

IN ALL CRIMINAL PROCEEDINGS, THE ACCUSED SHALL ENJOY THE RIGHT TO A SPEEDY AND PUBLIC TRIAL, BY AN IMPARTIAL JURY OF THE STATE AND DISTRICT WHEREIN THE CRIME SHALL HAVE BEEN COMMITTED, WHICH DISTRICT SHALL HAVE BEEN PREVIOUSLY ASCERTAINED BY LAW, AND TO BE INFORMED OF THE NATURE AND CAUSE OF THE ACCUSATION; TO BE CONFRONTED WITH THE WITNESSES AGAINST HIM; TO HAVE COMPULSORY PROCESS FOR OBTAINING WITNESSES IN HIS FAVOR, AND TO HAVE THE ASSISTANCE OF COUNSEL FOR HIS DEFENSE.

UNITED STATES CONSTITUTION, AMENDMENT FOURTEEN, SECTION 1.

ALL PERSONS BORN OR NATURALIZED IN THE UNITED STATES, AND SUBJECT TO THE JURISDICTION THEREOF, ARE CITIZENS OF THE UNITED STATES AND OF THE STATE WHEREIN THEY RESIDE. NO STATE SHALL

MAKE OR ENFORCE ANY LAW WHICH SHALL ABRIDGE THE PRIVILEGES OR IMMUNITIES OF CITIZENS OF THE UNITED STATES; NOR SHALL ANY STATE DEPRIVE ANY PERSON OF LIFE, LIBERTY, OR PROPERTY, WITHOUT DUE PROCESS OF LAW; NOR DENY TO ANY PERSON WITHIN ITS JURISDICTION THE EQUAL PROTECTION OF THE LAWS.

STATUTORY PROVISION INVOLVED

THE UNITED STATES CODE, ACT OF JUNE 25, 1948, c 646, 62 STAT. 967; AS AMENDED NOV. 2, 1966, PUB. L. 89-711, §2, 80 STAT. 1105, 28 U.S.C. §2254(D).

(D) IN ANY PROCEEDING INSTITUTED IN A FEDERAL COURT BY AN APPLICATION FOR A WRIT OF HABEAS CORPUS BY A PERSON IN CUSTODY PURSUANT TO THE JUDGMENT OF A STATE COURT, A DETERMINATION AFTER A HEARING ON THE MERITS OF A FACTUAL ISSUE, MADE BY A STATE COURT OF COMPETENT JURISDICTION IN A PROCEEDING TO WHICH THE APPLICANT FOR THE WRIT AND THE STATE OR AN OFFICER OR AGENT THEREOF WERE PARTIES, EVIDENCED BY A WRITTEN FINDING, WRITTEN OPINION, OR OTHER RELIABLE AND ADEQUATE WRITTEN INDICIA, SHALL BE PRESUMED TO BE CORRECT, UNLESS THE APPLICANT SHALL ESTABLISH OR IT SHALL OTHERWISE APPEAR, OR THE RESPONDENT SHALL ADMIT -

(1) THAT THE MERITS OF THE FACTUAL DISPUTE WERE NOT RESOLVED IN THE STATE COURT HEARING; ...

(8) OR UNLESS THAT PART OF THE RECORD OF THE STATE COURT PROCEEDING IN WHICH THE DETERMINATION OF SUCH FACTUAL ISSUE WAS MADE, PERTINENT TO A DETERMINATION OF THE SUFFICIENCY OF THE

EVIDENCE TO SUPPORT SUCH FACTUAL DETERMINATION, IS PRODUCED AS PROVIDED FOR HEREINAFTER, AND THE FEDERAL COURT ON A CONSIDERATION OF SUCH PART OF THE RECORD AS A WHOLE CONCLUDES THAT SUCH FACTUAL DETERMINATION IS NOT FAIRLY SUPPORTED BY THE RECORD:

AND IN AN EVIDENTIARY HEARING IN THE FEDERAL COURT, WHEN DUE PROOF OF SUCH FACTUAL DETERMINATION HAS BEEN MADE, UNLESS THE EXISTENCE OF ONE OR MORE OF THE CIRCUMSTANCES RESPECTIVELY SET FORTH IN PARAGRAPHS NUMBERED (1) TO (7), INCLUSIVE, IS SHOWN BY THE APPLICANT, OTHERWISE APPEARS, OR IS ADMITTED BY THE RESPONDENT, OR UNLESS THE COURT CONCLUDES PURSUANT TO THE PROVISIONS OF PARAGRAPH NUMBERED (8) THAT THE RECORD IN THE STATE COURT PROCEEDING, CONSIDERED AS A WHOLE, DOES NOT FAIRLY SUPPORT SUCH FACTUAL DETERMINATION, THE BURDEN SHALL REST UPON THE APPLICANT TO ESTABLISH BY CONVINCING EVIDENCE THAT THE FACTUAL DETERMINATION BY THE STATE COURT WAS ERRONEOUS.

STATEMENT OF THE CASE

PROCEDURAL HISTORY

RESPONDENT, JOHN SULLIVAN, WAS INDICTED BY THE PHILADELPHIA COUNTY GRAND JURY ON NOVEMBER 14, 1966, AS OF NOVEMBER SESSIONS, 1966, NOS. 190 AND 193, EACH CHARGING MURDER. RESPONDENT'S CO-DEFENDANTS, GREGORY CARCHIDI AND ANTHONY DIPASQUALE, WERE ALSO INDICTED AFTER A MEDICAL EXAMINER'S INQUEST. THESE CHARGES AROSE AS A CONSEQUENCE OF THE ASSASSINATION-LIKE KILLINGS OF JOHN GOREY AND RITA JANDA OCCURRING ON JUNE 17, 1966, AT THE TEAMSTER'S LOCAL UNION HALL. TRIAL WAS HELD BEFORE THE HONORABLE ALEXANDER F. BARBIERI AND A JURY BETWEEN JUNE 7, AND JUNE 19, 1967. ON THE LATTER DATE, RESPONDENT WAS CONVICTED OF TWO COUNTS OF FIRST DEGREE MURDER AND SENTENCED TO LIFE IMPRISONMENT. RESPONDENT WAS REPRESENTED BY PRIVATELY RETAINED COUNSEL, G. FRED DIBONA, ESQUIRE, NOW A PHILADELPHIA COURT OF COMMON PLEAS JUDGE, AND A. CHARLES PERUTO, ESQUIRE. BOTH COUNSEL WERE ALSO RETAINED BY RESPONDENT'S CO-DEFENDANTS, WHO WERE EACH TRIED SEPARATELY AND ACQUITTED SUBSEQUENT TO RESPONDENT'S TRIAL. JUDGE DIBONA ACTED AS RESPONDENT'S CHIEF COUNSEL, WHEREAS THE ROLES WERE REVERSED IN THE TRIALS OF THE CO-DEFENDANTS. POST TRIAL MOTIONS WERE DENIED BY A COURT EN BANC ON JULY 15, 1968. ON AUGUST 9, 1968, RESPONDENT WAS SENTENCED TO TWO CONSECUTIVE TERMS OF LIFE IMPRISONMENT.

A DIRECT APPEAL WAS TAKEN TO THE SUPREME COURT OF PENNSYLVANIA, WHICH AFFIRMED THE CONVICTION BY AN EQUALLY DIVIDED COURT. COMMONWEALTH V. SULLIVAN, 446 PA. 419, 286 A.2D 898 (1971) (APPENDIX E, INFRA, AT 1E). IN 1973, RESPONDENT FILED A PETITION UNDER THE PENNSYLVANIA POST CONVICTION HEARING ACT,[1] CHALLENGING, INTER ALIA, HIS REPRESENTATION BY COUNSEL, WHO IT WAS ALLEGED, NEGLECTED TO PRESENT ANY DEFENSE ON HIS BEHALF BECAUSE OF THEIR DUAL REPRESENTATION OF HIS CO-DEFENDANTS. AFTER SEVERAL EVIDENTIARY HEARINGS BEFORE THE HONORABLE ETHAN ALLEN DOTY, OF THE PHILADELPHIA COURT OF COMMON PLEAS, RESPONDENT WAS GRANTED THE RIGHT TO APPEAL TO THE PENNSYLVANIA SUPREME COURT NUNC PRO TUNC. RELIEF WAS OTHERWISE DENIED (APPENDIX F, INFRA, AT 1F).

ON FEBRUARY 28, 1977, THE PENNSYLVANIA SUPREME COURT AFFIRMED THE DECISION OF THE LOWER COURT DENYING POST CONVICTION RELIEF. COMMONWEALTH V. SULLIVAN, 472 PA. 129, 371 A.2D 468 (1977) (APPENDIX D, INFRA, AT 1D). THE COURT HELD, INTER ALIA, THAT RESPONDENT WAS NOT DENIED THE EFFECTIVE ASSISTANCE OF COUNSEL SINCE (1) THERE WAS NO DUAL REPRESENTATION IN THE TRADITIONAL SENSE, AND (2) THE DECISION WHETHER TO PRESENT A DEFENSE WAS A TACTICAL DECISION, NOT BASED UPON ANY CONFLICTING INTERESTS IN COUNSEL'S REPRESENTATION OF THE CO-DEFENDANTS.

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1 ACT OF JANUARY 25, 1966, P.L. (1965) 1580, §1, 19 P.S. §1180-1 ET SEQ. (SUPPLEMENT 1978-1979).

On July 18, 1977, respondent filed his fourth petition[2] for a writ of habeas corpus in the United States District Court for the Eastern District of Pennsylvania, docketed as Civil Action No. 77-2527. On February 2, 1978, United States District Judge John Morgan Davis denied the petition, adopting in part the Report and Recommendation of United States Magistrate Edwin E. Naythons (Appendix C, infra, at 1C). The Magistrate had recommended the issuance of the writ on Sixth Amendment grounds.

Respondent appealed on various grounds, and the case was argued before a panel of the United States Court of Appeals for the Third Circuit. On February 14, 1979, the Court of Appeals, on the basis of the state court record, reversed the order of the United States District Court and granted habeas corpus relief.[3] United States ex rel. Sullivan v. Cuyler, 593 F.2d 512 (3rd Cir. 1979) (Appendix B, infra, at 1B). The Commonwealth's petition for rehearing in banc was denied by that Court, Judges Garth, Adams and Rosenn dissenting, on March 12, 1979 (Appendix A, infra, at 1A).

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2 Three prior federal habeas corpus petitions were dismissed for failure to exhaust state remedies. United States ex rel. John Sullivan v. Rundle, No. 69-244; United States ex rel. John Sullivan v. A. T. Rundle, No. 69-452; United States ex rel. John Sullivan v. Robert L. Johnson, CA No. 73-1694.

3 The Court of Appeals granted relief on Sixth Amendment grounds and therefore failed to consider the other issues raised by respondent.

Factual History

The evidence surrounding respondent's conviction was amply summarized by the Pennsylvania Supreme Court as follows:

> The chief prosecution witness, one Francis McGrath, was employed as a janitor at the union hall where the bodies were eventually discovered. On July 17, 1966, he arrived at work at approximately 6:00 P.M. and parked his automobile in the lot adjacent to the building. At that time, he specifically observed two other vehicles on the premises. One was owned by appellant and the other was being used at the time by one Anthony DiPasquale. After alighting from his car, McGrath noticed appellant looking out onto the parking lot from the window of a second floor office normally used by other union officials. The witness then entered the building and proceeded to the second floor to commence his duties. Appellant was still seated by the window when McGrath entered that office. Sullivan inquired about the janitor's presence and instructed McGrath to wait until Sunday night to clean, since a union meeting was scheduled for that date and the building would require cleaning after the gathering. McGrath ignored the suggestion and continued collecting the trash from the offices. The witness then took the refuse outside the building. When he returned, appellant was still seated at the window.
>
> At this time, both Sullivan and McGrath observed John Gorey and Rita Janda arrive at the union hall in Gorey's car and enter the building. McGrath then began cleaning the conference room, located approximately 75 feet from Gorey's office. Shortly thereafter, Gorey appeared and had a brief conversation with McGrath. Immediately after Gorey left the conference room, appellant appeared in the doorway, through which Gorey had just passed, and again questioned McGrath about the cleaning and suggested he defer his activities until Sunday afternoon. During this brief conversation, Gregory Carchidi, another janitor, entered the conference room. No conversation ensued between Carchidi and Sullivan but Carchidi repeated appellant's urgings to leave the work until Sunday. Sullivan then left the room through the same door which Gorey had exited but Carchidi remained and seated himself behind the desk.

WITHIN SEVERAL MINUTES, THE WITNESS TESTIFIED HE HEARD SOUNDS LIKE FIRECRACKERS GOING OFF IN RAPID SUCCESSION. MCGRATH STARTED TO QUESTION CARCHIDI ABOUT THE DISTURBANCE BUT WAS ABRUPTLY INSTRUCTED TO "GET OUT OF THE BUILDING AND DON'T SAY NOTHING" (SIC). MCGRATH LEFT THE UNION HALL AND NOTICED FOUR CARS OTHER THAN HIS OWN PARKED IN THE LOT. THESE WERE RECOGNIZED AS BELONGING TO DIPASQUALE, GOREY, CARCHIDI AND APPELLANT. MCGRATH DROVE OFF BUT RETURNED TO THE PREMISES WITHIN 15 MINUTES. ONLY GOREY'S CAR REMAINED IN THE LOT. UPON RE-ENTERING THE BUILDING, HE FOUND THE OFFICES CLOSED, THE CONFERENCE ROOM LOCKED AND THE LIGHTS OUT.

THE VICTIMS' BODIES WERE DISCOVERED THE FOLLOWING MORNING. GOREY HAD BEEN SHOT FOUR TIMES AND JANDA SIX TIMES, THE SHOTS BEING FIRED FROM CLOSE RANGE. THE BALLISTICS STUDIES ESTABLISHED TWO SEPARATE GUNS WERE EMPLOYED IN THE HOMICIDES BUT THE WEAPONS WERE NEVER RECOVERED.

ADDITIONAL TESTIMONY DISCLOSED THAT THE TELEPHONE LINES HAD BEEN ARRANGED SO THAT REGULAR INCOMING CALLS WOULD RING IN THE ROOM IN WHICH APPELLANT WAS SEATED. A SECOND LINE WITH A DIFFERENT CALL NUMBER HAD BEEN PREARRANGED BY GOREY TO RING IN HIS OFFICE SO THAT HE COULD RECEIVE AN ANTICIPATED CALL FROM JOSEPH VERNICK AT 7:00 P.M. ONE IRENE GLENN TESTIFIED FOR THE COMMONWEALTH THAT SHE DIALED THE REGULAR UNION PHONE NUMBER ABOUT 6:15 P.M. THAT EVENING AND A MAN ANSWERED IDENTIFYING HIMSELF AS GOREY. A SCRAP PAPER FOUND IN THE WASTEBASKET ALONGSIDE THE DESK WHERE APPELLANT HAD BEEN SEATED PRIOR TO THE VICTIM'S (SIC) ARRIVAL CONTAINED MS. GLENN'S NAME AND TELEPHONE NUMBER. IT WAS UNCONTESTED THAT THE HANDWRITING WAS THAT OF APPELLANT. MOREOVER, ONE JOSEPH VERNICK TESTIFIED THAT HE CALLED GOREY'S OFFICE AT A SPECIALLY ARRANGED TIME BUT RECEIVED NO ANSWER DESPITE HIS REPEATED ATTEMPTS BETWEEN 7:15 AND 8:15 P.M. THIS EVIDENCE, COUPLED WITH THE MEDICAL EXAMINER'S TESTIMONY, INDICATED THAT THE TIME OF DEATH COULD HAVE BEEN APPROXIMATELY 7:15 P.M. ... ADDITIONAL EVIDENCE OF GUILT MAY ALSO BE INFERRED FROM APPELLANT'S STATEMENTS TO POLICE. DURING QUESTIONING SEVERAL DAYS AFTER THE MURDERS, SULLIVAN DENIED BEING PRESENT AT THE BUILDING DURING THE TIME OF THE SHOOTINGS. THIS CONTRADICTED MCGRATH'S STATEMENT WHICH PLACED SULLIVAN IN DIRECT

PROXIMITY TO THE CRIME ONLY MOMENTS BEFORE ITS OCCURRENCE. MOREOVER, MCGRATH STATED THAT WHEN HE LEFT THE BUILDING SULLIVAN'S CAR WAS STILL PARKED IN THE LOT.

COMMONWEALTH V. SULLIVAN, SUPRA, 472 PA. AT 147-49, 151, 371 A.2D AT 477-479.

RESPONDENT DID NOT TESTIFY AND NO EVIDENCE WAS INTRODUCED ON HIS BEHALF.

IN SUPPORT OF ITS DECISION GRANTING THE WRIT, THE COURT BELOW RELIED SOLELY UPON CERTAIN CONTRADICTED AND INCONSISTENT TESTIMONY OF ONE OF RESPONDENT'S TRIAL ATTORNEYS GIVEN AT THE STATE POST CONVICTION HEARING.[4] THE TESTIMONY RELIED UPON WERE STATEMENTS OF ATTORNEY PERUTO, WHO TWICE INDICATED THAT ONE REASON, AMONG OTHERS, FOR HIS RECOMMENDATION THAT RESPONDENT NOT TESTIFY OR PRESENT OTHER WITNESSES WAS A DESIRE NOT TO REVEAL DEFENSE WITNESSES BEFORE THE TRIAL OF THE TWO CO-DEFENDANTS (N.T. P.C.H.A. 4/24/74, 101-102, 107). PERUTO ALSO TESTIFIED TO OTHER STRATEGIC REASONS WHY HE RECOMMENDED THAT RESPONDENT NOT TESTIFY (N.T. P.C.H.A. 4/24/74, 102) OR CALL OTHER DEFENSE WITNESSES (N.T. P.C.H.A. 4/24/74, 20, 99-100, 105-107, 118, 122).

PERUTO'S TESTIMONY ABOUT HIS DESIRE TO PROTECT THE CO-DEFENDANTS WAS CONTRADICTED, HOWEVER, BY JUDGE DIBONA, WHO, AS CHIEF COUNSEL, TESTIFIED THAT THE DECISION NOT TO PRESENT A DEFENSE, EITHER THROUGH RESPONDENT OR THROUGH OTHER WITNESSES,

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[4] TESTIMONY ELICITED AT SAID HEARING, WHICH SPANNED FIVE DAYS, WILL BE HEREINAFTER CITED AS N.T. P.C.H.A., WITH ADDITIONAL REFERENCE TO THE PARTICULAR DATE SUCH TESTIMONY WAS TAKEN.

WAS MADE BY RESPONDENT AFTER DISCUSSION WITH COUNSEL (N.T. P.C.H.A. 5/15/74. 5-7, 16), AND WAS IN NO WAY INFLUENCED BY THE REPRESENTATION OF THE CO-DEFENDANTS (N.T. P.C.H.A. 5/15/74, 6). JUDGE DIBONA TESTIFIED FURTHER THAT HE WAS FULLY PREPARED TO TRY RESPONDENT'S CASE; THAT HE HAD FULL CONSULTATION WITH RESPONDENT EVERY STEP OF THE WAY; AND THAT HE SAW NO CONFLICT WHATSOEVER IN HIS LIMITED REPRESENTATION OF THE CO-DEFENDANTS (N.T. P.C.H.A. 4/24/74, 56). HE ALSO TESTIFIED THAT RESPONDENT DID NOT WANT TO TESTIFY FROM THE BEGINNING AND THAT AFTER A LENGTHY DISCUSSION BETWEEN COUNSEL AND RESPONDENT, AS WELL AS HIS FAMILY, RESPONDENT MADE THE DECISION NOT TO TESTIFY (N.T. P.C.H.A. 4/24/74, 10-11, 36; 5/15/74, 5-6).

THE PENNSYLVANIA COURTS, IN DENYING RESPONDENT RELIEF ON HIS INEFFECTIVE ASSISTANCE CLAIM, IMPLICITLY REJECTED ATTORNEY PERUTO'S TESTIMONY AND CREDITED THAT OF JUDGE DIBONA. THE PENNSYLVANIA SUPREME COURT FOUND THAT JUDGE DIBONA WAS RESPONDENT'S CHIEF TRIAL COUNSEL, AND AS SUCH HE MADE ALL DECISIONS RELEVANT TO SULLIVAN'S DEFENSE. COMMONWEALTH V. SULLIVAN, 472 PA. AT 161. PERUTO SERVED IN THE CAPACITY OF AN ASSISTANT COUNSEL, ALTHOUGH THE ROLES WERE REVERSED IN THE TRIALS OF THE CO-DEFENDANTS. IN LIGHT OF THIS, THE PENNSYLVANIA SUPREME COURT DETERMINED THAT NO DUAL REPRESENTATION, IN THE TRADITIONAL SENSE, EXISTED AND THAT NO EVIDENCE OF A CONFLICT WAS SHOWN. ID. AT 161-162.

REASONS FOR GRANTING THE WRIT

I. THE SIXTH AMENDMENT STANDARD OF REVIEW UTILIZED BY THE COURT OF APPEALS FOR THE THIRD CIRCUIT IN DETERMINING CONFLICTS OF INTERESTS FOR DEFENSE ATTORNEYS IN STATE CRIMINAL TRIALS IS INCONSISTENT WITH STANDARDS ENUNCIATED BY EVERY OTHER COURT OF APPEALS AND FINDS NO SUPPORT IN THE PRIOR DECISIONS OF THIS COURT.

IN REVERSING RESPONDENT'S MULTIPLE MURDER CONVICTIONS ON SIXTH AMENDMENT CONFLICT OF INTEREST GROUNDS, THE COURT BELOW POSITED ITS STANDARD OF REVIEW AS FOLLOWS:

> THERE MUST BE SOME SHOWING OF A <u>POSSIBLE CONFLICT OF INTEREST OR PREJUDICE</u>, HOWEVER REMOTE, BEFORE A REVIEWING COURT WILL FIND THE DUAL REPRESENTATION CONSTITUTIONALLY DEFECTIVE ... ACTUAL PREJUDICE OR CONFLICT OF INTEREST NEED NOT BE SHOWN. THE MERE POSSIBILITY, HOWEVER REMOTE, IS SUFFICIENT.[5]

THE COURT BELOW, IN THE PARTICULAR CONTEXT OF THIS CASE, ALSO NOTED:

> ... RESPONDENTS ARE ASKING US TO DECIDE THAT THERE WAS IN FACT NO PREJUDICE. THIS MISSES THE POINT. THE STANDARD REQUIRES US TO DETERMINE WHETHER THERE IS A POSSIBILITY OF PREJUDICE, <u>OR CONFLICT OF INTEREST, HOWEVER REMOTE</u>. TO HOLD, IN THE FACE OF THIS RECORD, THAT THERE WAS NOT SUCH A POSSIBILITY WOULD BE TO, IN EFFECT, OVERRULE A LONG LINE OF CASES IN THIS CIRCUIT AND REQUIRE A SHOWING OF ACTUAL PREJUDICE. THIS WE CANNOT DO.

(EMPHASIS ADDED) ID. AT 522.

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[5] <u>UNITED STATES EX REL. SULLIVAN V. CUYLER</u>, 593 F.2D AT 519-520 (APPENDIX B, <u>INFRA</u>, AT PP. 12-13B).

IT IS RESPECTFULLY SUBMITTED THAT THE STANDARD UTILIZED BY THE COURT BELOW IMPROPERLY INTERPRETS THE SIXTH AMENDMENT REQUIREMENT THAT CRIMINAL DEFENDANTS BE AFFORDED THE EFFECTIVE ASSISTANCE OF COUNSEL AND HAS NO SUPPORT IN THIS COURT'S CONFLICTS OF INTEREST DECISIONS. SEE, E.G., GLASSER V. UNITED STATES, 315 U.S. 60 (1942), AND HOLLOWAY V. ARKANSAS, 435 U.S. 475 (1978). FURTHERMORE, THIS STANDARD IS TOTALLY INCONSISTENT WITH THAT USED IN EVERY OTHER CIRCUIT COURT OF APPEALS. FOR ALL OF THESE REASONS, THIS COURT SHOULD ISSUE A WRIT OF CERTIORARI TO REVIEW THE DECISION OF THE COURT BELOW.

THIS COURT HAS, IN THE PAST, COMMENTED ON THE DIFFERENT APPROACHES BY VARIOUS COURTS IN DETERMINING THE EXISTENCE OF CONFLICTS OF INTEREST. HOLLOWAY V. ARKANSAS, 98 S. CT. AT 1178. VARIOUS COMMENTATORS HAVE ALSO INDICATED THAT THE COURTS OF APPEAL ARE IN DISARRAY IN THEIR RESOLUTION OF THIS PROBLEM. SEE, E.G., GEER, REPRESENTATION OF MULTIPLE CRIMINAL DEFENDANTS: CONFLICTS OF INTEREST AND THE PROFESSIONAL RESPONSIBILITY OF THE DEFENSE ATTORNEY, 62 MINN. L. REV. 119 (1977); HYMAN, JOINT REPRESENTATION OF MULTIPLE DEFENDANTS IN A CRIMINAL TRIAL: THE COURT'S HEADACHE, 5 HOFSTRA L. REV. 315 (1977); COMMENTS: CONFLICT OF INTERESTS IN MULTIPLE REPRESENTATION OF CRIMINAL CO-DEFENDANTS, 68 JOURNAL OF CRIMINAL LAW AND CRIMINOLOGY, 226 (1977); NOTE, ENSURING EFFECTIVE ASSISTANCE OF COUNSEL FOR THE

CRIMINAL CO-DEFENDANT, 37 LA. L. REV. 1289 (1977); WANAT, CONFLICTS OF INTEREST IN CRIMINAL CASES AND THE RIGHT TO EFFECTIVE ASSISTANCE OF COUNSEL - THE NEED FOR CHANGE, 10 RUT. - CAM. L. REV. 57 (1978).

IN GLASSER V. UNITED STATES, SUPRA, THIS COURT HELD THAT BY REQUIRING AN ATTORNEY TO REPRESENT TWO CO-DEFENDANTS WHOSE INTERESTS WERE IN CONFLICT, WHICH CONFLICT WAS BOTH READILY APPARENT AND POINTED OUT TO THE COURT, ONE DEFENDANT WAS DENIED HIS SIXTH AMENDMENT RIGHT TO THE EFFECTIVE ASSISTANCE OF COUNSEL. IN HOLLOWAY V. ARKANSAS, THIS COURT REAFFIRMED GLASSER BY HOLDING THAT ONCE AN IMPERMISSIBLE CONFLICT OF INTEREST IS SHOWN, AND THE TRIAL COURT REFUSES TO APPOINT SEPARATE COUNSEL OVER OBJECTION, NO INQUIRY INTO THE DEGREE OF PREJUDICE IS NECESSARY. 98 S. CT. AT 1181. HOWEVER, THIS COURT IMPLICITLY INDICATED THAT A CONFLICT OF INTEREST MUST BE SHOWN:

> FINALLY, A RULE REQUIRING A DEFENDANT TO SHOW THAT A CONFLICT OF INTERESTS - WHICH HE AND HIS COUNSEL TRIED TO AVOID BY TIMELY OBJECTIONS TO THE JOINT REPRESENTATION - PREJUDICED HIM IN SOME SPECIFIC FASHION WOULD NOT BE SUSCEPTIBLE TO INTELLIGENT, EVENHANDED APPLICATION ... AND TO ASSESS THE IMPACT OF A CONFLICT OF INTERESTS ON THE ATTORNEY'S OPTIONS, TACTICS AND DECISIONS IN PLEA NEGOTIATIONS WOULD BE VIRTUALLY IMPOSSIBLE.

98 S. CT. AT 1182 (EMPHASIS ADDED).

PETITIONER HEREIN DOES NOT CHALLENGE THE CLEARLY ESTABLISHED PRINCIPLE THAT ONCE A CONFLICT OF INTEREST IS ESTABLISHED, NO INQUIRY INTO THE DEGREE OF PREJUDICE IS NECESSARY. THE THIRD CIRCUIT COURT OF APPEALS, HOWEVER, HAS

GONE FURTHER IN ITS APPROACH AND EXPRESSLY HELD THAT ALL A HABEAS CORPUS PETITIONER NEED SHOW TO OBTAIN RELIEF IS A POSSIBILITY THAT A CONFLICT OF INTEREST MAY HAVE EXISTED. THUS, IN THE THIRD CIRCUIT, A HABEAS PETITIONER NOT ONLY IS NOT REQUIRED TO ESTABLISH ACTUAL PREJUDICE, HE ALSO HAS NO BURDEN TO EVEN ESTABLISH THE EXISTENCE OF AN ACTUAL CONFLICT.

THE MINIMAL STANDARD EMPLOYED BY THE COURT BELOW PUTS IT AT ODDS WITH EVERY OTHER COURT OF APPEALS, SAVE ARGUABLY THE DISTRICT OF COLUMBIA COURT OF APPEALS. THE OVERWHELMING MAJORITY OF CIRCUIT COURTS OF APPEAL REQUIRE THAT AN ACTUAL CONFLICT OF INTEREST OR ACTUAL PREJUDICE BE ESTABLISHED. SEE, E.G., UNITED STATES V. FOSTER, 469 F.2D 1 (1ST CIR. 1972) (DEFENDANT DID NOT SHOW ANY PREJUDICE FROM JOINT REPRESENTATION); KAPLAN V. BOMBARD, 573 F.2D 708 (2ND CIR. 1978) (DEFENDANT MUST SHOW SOME SPECIFIC INSTANCE OF PREJUDICE, SOME REAL CONFLICT OF INTEREST); UNITED STATES V. CARRIGAN, 543 F.2D 1053 (2ND CIR. 1976) (REAL CONFLICT OF INTEREST AND PREJUDICE PRESENT SINCE EACH DEFENDANT GAVE DIFFERENT VERSION OF INCIDENT TO POLICE AND DEFENDANT'S TRIAL TESTIMONY WAS IN CONFLICT WITH THE CO-DEFENDANT'S STATEMENT, WHICH WAS ALSO ADMITTED AT TRIAL); UNITED STATES V. ATKINSON, 565 F.2D 1283 (4TH CIR. 1977), CERT. DENIED, 98 S. CT. 2845 (1978) (DEFENDANT MUST SHOW SOME SPECIFIC INSTANCE OF PREJUDICE AND SOME REAL CONFLICT OF INTEREST); HAGGARD V. STATE OF ALABAMA, 550 F.2D 1019, REHEARING DENIED, 554 F.2D 475 (5TH CIR. 1977) (DEFENDANT MUST SHOW ACTUAL

PREJUDICE); FOXWORTH V. WAINWRIGHT, 516 F.2D 1072 (5TH CIR. 1975) (ACTUAL PREJUDICE EXISTS AS TO MINIMALLY INVOLVED DEFENDANT SINCE PLAUSIBLE DEFENSE OF SHIFTING BLAME TO CO-DEFENDANTS FORECLOSED BY JOINT REPRESENTATION); THACKER V. BORDENKIRCHER, 590 F.2D 640 (6TH CIR. 1979) (DEFENDANT MUST SHOW THAT THERE WAS A CONFLICT OF INTEREST AND THAT HE WAS PREJUDICED THEREBY; THE ESTABLISHMENT OF MERE POTENTIAL CONFLICT ARISING FROM JOINT REPRESENTATION IS NOT SUFFICIENT TO CONSTITUTE DENIAL OF THE SIXTH AMENDMENT); UNITED STATES V. WOODS, 544 F.2D 242 (6TH CIR. 1976), CERT. DENIED, 429 U.S. 1062 (1977) (DEFENDANT MUST SHOW ACTUAL PREJUDICE); UNITED STATES EX REL. MCCLINDON V. WARDEN, ILL. ST. PEN., 575 F.2D 108 (7TH CIR. 1978) (DEFENDANT MUST SHOW THAT A CONFLICT OF INTEREST EXISTED IN FACT); UNITED STATES V. MANDELL, 525 F.2D 671 (7TH CIR. 1975), CERT. DENIED, 423 U.S. 1049 (1976) (DEFENDANT MUST SHOW WITH A REASONABLE DEGREE OF SPECIFICITY THAT A CONFLICT OF INTEREST ACTUALLY EXISTED AT TRIAL; SOMETHING MORE THAN "A POSSIBLE CONFLICT OF INTEREST, HOWEVER REMOTE" NEEDED); DAVIDSON V. CUPP, 446 F.2D 642 (9TH CIR. 1971) (DEFENDANT MUST SHOW SPECIFIC PREJUDICE IN ORDER TO PREVAIL); WATKINS V. WILSON, 408 F.2D 351 (9TH CIR. 1969) (DEFENDANT MUST DEMONSTRATE THAT SOME SPECIFIC PREJUDICE RESULTED FROM THE JOINT REPRESENTATION); FRYAR V. UNITED STATES, 404 F.2D 1071 (10TH CIR. 1968), CERT. DENIED, 395 U.S. 964 (1969) (DEFENDANT MUST SHOW THAT PREJUDICE RESULTED FROM THE JOINT REPRESENTATION).

THE EIGHTH CIRCUIT COURT OF APPEALS REQUIRES A SHOWING OF ACTUAL PREJUDICE OR A SUBSTANTIAL POSSIBILITY OF A CONFLICT OF INTEREST. AUSTIN V. ERICKSON, 477 F.2D 620 (8TH CIR. 1973); BERAN V. UNITED STATES, 580 F.2D 324 (8TH CIR. 1978), CERT. DENIED, ___ U.S. ___, 99 S. CT. 1422 (1979) (DEFENDANT MUST SHOW THAT THERE WAS AN ACTUAL CONFLICT OF INTEREST OR A SUBSTANTIAL POSSIBILITY OF SUCH A CONFLICT).

THE CONFLICT OF INTEREST STANDARD IN THE DISTRICT OF COLUMBIA CIRCUIT REQUIRES THE COURT TO DETERMINE IF THE RECORD SHOWS THE ABSENCE OF PREJUDICE OR A CONFLICT OF INTEREST BEYOND A REASONABLE DOUBT. LOLLAR V. UNITED STATES, 376 F.2D 243 (D.C. CIR. 1967). EVEN THAT STANDARD, HOWEVER, REQUIRES THE COURT TO EXAMINE THE RECORD AS A WHOLE TO DETERMINE THE POSSIBILITY OF PREJUDICE.

THE STANDARD OF REVIEW OF THE COURT BELOW IS UNWARRANTED AND, IT IS RESPECTFULLY SUBMITTED, GOES FAR BEYOND THE CONSTITUTIONAL STANDARDS ESTABLISHED IN ALL OTHER CIRCUITS. CERTAINLY THIS COURT HAS NEVER INDICATED THAT THE UNITED STATES CONSTITUTION IS VIOLATED BY THE EXISTENCE OF A POSSIBLE CONFLICT OF INTEREST OR PREJUDICE, HOWEVER REMOTE.

IN LIGHT OF THE SPLIT OF AUTHORITY REFERRED TO ABOVE AND THE FACT THAT THE INSTANT CLAIM WAS REJECTED BY PENNSYLVANIA'S HIGHEST COURT, AS WELL AS THE UNITED STATES DISTRICT COURT BELOW, AND BECAUSE THE DECISION OF THE COURT BELOW WILL PLACE

AN UNWARRANTED BURDEN ON STATE PROSECUTORS IN THE THIRD CIRCUIT, IT IS RESPECTFULLY REQUESTED THAT THIS COURT ISSUE A WRIT OF CERTIORARI TO REVIEW THE DECISION OF THE COURT OF APPEALS FOR THE THIRD CIRCUIT.

II. Even Assuming That The Standard Of Review Applied Below Is Constitutionally Mandated When Court Appointed Counsel Represents Two Or More Defendants At The Same Trial, The Circumstances Presented Herein, Namely The Representation Of Respondent And His Separately Tried Co-Defendants By Two Privately Retained Attorneys, Compels The Use Of A Different Standard Of Review Under The Sixth Amendment.

Even if this Court were to determine that the Sixth Amendment standard of review utilized below is constitutionally required as a general proposition, the circumstances herein mandate a stricter standard of review. Such review must require a showing, in fact, of an actual conflict of interest or prejudice, in order to reverse state criminal convictions. By its failure to differentiate between joint and separate trials, as well as privately retained versus court appointed counsel, the Court below misconstrued the Sixth and Fourteenth Amendments of the Constitution.

Initially, the instant record reveals that respondent was tried apart from his two co-defendants, both of whom were subsequently and separately tried. There can be no doubt that the many unfavorable aspects of a joint criminal trial can weigh heavily against a criminal defendant. Considerations such as varying degrees of culpability; differences in defense strategies; the possibility of guilt by association; and the decision whether to testify or not, are all accentuated in the context of a joint trial.[6] In the context of separate trials,

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[6] See, e.g., ABA Standards Relating to the Administration of Criminal Justice, Joinder and Severance, §13-2.2 (2nd ed. 1978).

however, the possibility of any inherent unfairness is nonexistent. Thus, it has been held that a greater showing of prejudice in conflicts claims must be made in cases of dual representation[7] as opposed to joint representation. See, e.g., Miller v. United States, 564 F.2d 103, 106 (1st Cir. 1977), cert. denied, 435 U.S. 931 (1978).

The instant record reveals, at most, dual representation by two privately retained attorneys. In fact, both the Pennsylvania Supreme Court and the United States District Court determined that the concept of dual representation, in its traditional sense, was inapplicable instantly.[8] Both courts found that the significant differences in the division of responsibility between respondent's two privately retained counsel precluded a finding of dual representation.[9]

Whether or not the division of responsibility by respondent's attorneys precludes a finding of dual representation, the fact that respondent was separately tried surely warrants a stricter

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[7] Hereinafter, the phrase dual representation refers to the concept of an attorney representing co-defendants who are separately tried.

[8] Commonwealth v. Sullivan, Appendix D, infra, at 33-34D; United States ex rel. Sullivan v. Cuyler, Appendix C, infra, at 5C.

[9] Judge DiBona was respondent's chief trial counsel. Attorney Peruto testified that Judge DiBona made the ultimate decisions in respondent's representation (N.T. P.C.H.A. 4/24/74, 90, 108-109). The roles were reversed in the separate trials of the two co-defendants (N.T. P.C.H.A. 4/24/74, 90).

STANDARD OF REVIEW THAN THAT APPLIED BY THE COURT BELOW. IN THE FACTUAL CONTEXT PRESENTLY INVOLVED, IT IS RESPECTFULLY SUBMITTED THAT AN ACTUAL CONFLICT OF INTEREST OR PREJUDICE MUST BE DEMONSTRATED. NO SUCH CONFLICT OR PREJUDICE EXISTS HEREIN.

ADDITIONALLY, THE COURT BELOW FAILED TO RECOGNIZE THE FACT THAT A DIFFERENT STANDARD OF REVIEW WAS REQUIRED SINCE RESPONDENT'S REPRESENTATION WAS OF HIS OWN CHOOSING, AND NOT THAT OF THE STATE'S. RESPONDENT, ALONG WITH HIS CO-DEFENDANTS, PRIVATELY RETAINED TWO EXCEEDINGLY EXPERIENCED CRIMINAL TRIAL ATTORNEYS. UNDER THESE CIRCUMSTANCES, HABEAS CORPUS RELIEF WOULD ONLY BE WARRANTED IF (1) RESPONDENT'S REPRESENTATION WAS SO LACKING IN EFFECTIVENESS, BECAUSE OF THE DUAL REPRESENTATION, AS TO HAVE DEPRIVED HIM OF A FUNDAMENTALLY FAIR TRIAL; OR (2) THE TRIAL JUDGE OR PROSECUTOR KNEW THAT RESPONDENT RECEIVED INCOMPETENT REPRESENTATION AND TOOK NO REMEDIAL ACTION, OR THAT THE INCOMPETENCY OF RESPONDENT'S REPRESENTATION WAS SO APPARENT THAT THEY SHOULD HAVE BEEN AWARE OF IT AND COULD HAVE CORRECTED IT. ONLY THEN CAN RESPONDENT'S RETAINED ATTORNEYS' ACTIONS BE ATTRIBUTED TO THE COMMONWEALTH FOR FOURTEENTH AMENDMENT REVIEW PURPOSES.

THE COURT BELOW FOUND A SIXTH AMENDMENT VIOLATION IN THE DUAL REPRESENTATION OF RESPONDENT AND TWO SEPARATELY TRIED CO-DEFENDANTS BY TWO RETAINED ATTORNEYS BECAUSE, IN ITS VIEW, A POSSIBILITY OF CONFLICTING INTERESTS OR PREJUDICE, HOWEVER REMOTE, EXISTED. SUCH A DETERMINATION MISCONSTRUES THE

UNITED STATES CONSTITUTION AND FINDS NO SUPPORT IN ANY OF THE DECISIONS OF THIS COURT OR ANY OTHER FEDERAL APPELLATE COURT. BY MECHANICALLY APPLYING ITS OWN CONFLICT OF INTEREST STANDARD, AS WELL AS IGNORING CERTAIN CONTRARY THIRD CIRCUIT DECISIONAL LAW,[10] THE COURT BELOW IMPROPERLY EXTENDED SIXTH AMENDMENT REVIEW.

WITH RESPECT TO INDIGENT STATE CRIMINAL DEFENDANTS, THIS COURT HAS DETERMINED THAT THE DUE PROCESS CLAUSE OF THE FOURTEENTH AMENDMENT REQUIRES THE APPOINTMENT OF EFFECTIVE COUNSEL. POWELL V. ALABAMA, 287 U.S. 45, 71 (1932). ADDITIONALLY, IF COUNSEL'S REPRESENTATION AMOUNTS TO A MERE FORMALITY OR SHAM, DUE PROCESS ALONE VITIATES THE PROCEEDINGS. AVERY V. ALABAMA, 308 U.S. 444 (1940); HAWK V. OLSEN, 326 U.S. 271 (1945); WHITE V. RAGEN, 324 U.S. 760 (1945); HOUSE V. MAYO, 324 U.S. 42 (1945). SIMILARLY, UNDER THE SIXTH AMENDMENT, AN INDIGENT MUST BE PROVIDED WITH APPOINTED COUNSEL IN ALL STATE CRIMINAL TRIALS INVOLVING IMPRISONMENT. GIDEON V. WAINWRIGHT, 372 U.S. 335, 344-345 (1963); ARGERSINGER V. HAMLIN, 407 U.S. 25 (1972); SCOTT V. ILLINOIS, ___ U.S. ___, 99 S. CT.

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[10] UNITED STATES EX REL. DARCY V. HANDY, 203 F.2D 407, 426-427 (3RD CIR.) (EN BANC), CERT DENIED, 346 U.S. 865 (1953); UNITED STATES EX REL. WILKINS V. BANMILLER, 205 F. SUPP. 123 (E.D. PA. 1962), AFF'D, 325 F.2D 514, 516 (3RD CIR. 1963), CERT. DENIED, 379 U.S. 847 (1964); UNITED STATES EX REL. O'BRIEN V. MARONEY, 423 F.2D 865, 869-870 (1970); UNITED STATES EX REL. GREEN V. RUNDLE, 434 F.2D 1112, 1113 (3RD CIR. 1970); UNITED STATES EX REL. HART V. DAVENPORT, 478 F.2D 203, 210-211 (3RD CIR. 1973).

1158 (1979).[11] In such cases the state action requirement of Fourteenth Amendment review is obvious since the state is directly responsible in selecting counsel.

However, since respondent exercised his fundamental right to counsel of his choice, the Court below utilized an erroneous standard of review in finding a Sixth Amendment violation attributable to the Commonwealth of Pennsylvania.

In order for a Sixth Amendment violation to have occurred it must be shown that the trial judge or prosecutor knew that respondent received incompetent representation and took no remedial action, or that the incompetency of respondent's representation was so apparent that they should have been aware of it and could have corrected it. Fitzgerald v. Estelle, 505 F.2d 1334 (5th Cir.), cert. denied, 422 U.S. 1011 (1975). Only then can a privately retained attorney's actions be attributed to the state for Fourteenth Amendment purposes.

The Third Circuit Court of Appeals has recognized the above distinction, but nevertheless chose to ignore it herein. United States ex rel. Hart v. Davenport, 478 F.2d 203, 210-211 (3rd Cir. 1973). Nowhere in its opinion granting relief does

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[11] In the context of recommending that a defendant plead guilty, this Court has defined effective assistance to mean that such advice be "within the range of competence demanded of attorneys in criminal cases." McMann v. Richardson, 397 U.S. 759, 771 (1970); Tollett v. Henderson, 411 U.S. 258 (1973). Other than the above definition, this Court has never explicitly defined the minimum degree of effectiveness necessary for Sixth Amendment purposes. Maryland v. Marzullo, 435 U.S. 1011, 98 S. Ct. 1885 (1978) (Justices White and Rhenquist dissenting from this Court's denial of Certiorari to review Fourth Circuit's adoption of a new constitutional standard in Marzullo v. Maryland, 561 F.2d 540 (4th Cir. 1977).

the Court below differentiate between retained versus appointed counsel. As the three judge dissent from the order denying rehearing in banc stated:

> But although state action was found to be present in Hart, there would appear to be no evidence in the present case that the trial judge or the prosecutor was aware, or should have been aware, of the alleged conflict of interest. And certainly nothing in the record suggests that Sullivan's representation by two of Philadelphia's best known trial attorneys was so grossly deficient as to render the proceedings fundamentally unfair.

Appendix A, infra, at .

In United States v. Alvarez, 580 F.2d 1251 (5th Cir. 1978), the Fifth Circuit appropriately reconciled its conflict of interest standard of review with the privately retained versus appointed counsel dichotomy. The government argued that a more stringent test was required for determining the effectiveness of counsel in conflicts cases involving retained counsel. The Court stated (Id. at 1256):

> Applying, as we must, the standards established by Fitzgerald for judging effectiveness-of-counsel claims, we find that conflict-of-interest cases such as the instant one fall within the due process category of cases. Consequently, we hold that an attorney, whether retained or appointed laboring under an actual conflict of interest in his representation of an accused fails to accord him effective assistance of counsel as guaranteed by the due process clause of the Fifth Amendment, and a fortiori, the Sixth Amendment.

THE COURT THEREAFTER DETERMINED THAT AN ACTUAL CONFLICT OF INTEREST EXISTED, AND RELYING ON THIS COURT'S DECISION IN HOLLOWAY V. ARKANSAS, SUPRA, CORRECTLY DETERMINED THAT NO SHOWING OF PREJUDICE IS REQUIRED ONCE AN ACTUAL CONFLICT OF INTEREST IS ESTABLISHED. UNITED STATES V. ALVAREZ, SUPRA AT 1259 N. 14.

BY ATTRIBUTING TO THE STATE, FOR FOURTEENTH AMENDMENT PURPOSES, ITS FINDING THAT A POSSIBILITY OF PREJUDICE, HOWEVER REMOTE, IS SUFFICIENT TO WARRANT HABEAS CORPUS RELIEF IN THIS CASE, THE COURT BELOW HAS ENTERED AN UNCHARTERED SEA, AND CONSTITUTIONALLY MISCONSTRUES THE SIXTH AND FOURTEENTH AMENDMENTS, AND THIS COURT'S PRIOR CONFLICTS OF INTERESTS DECISIONS.

PETITIONER READILY CONCEDES THAT CERTAIN COURTS HAVE REJECTED ANY DISTINCTION BETWEEN RETAINED VERSUS APPOINTED COUNSEL IN WEIGHING INEFFECTIVE ASSISTANCE OF COUNSEL CLAIMS.[12] HOWEVER, IN EACH OF THESE CIRCUITS, IN ORDER TO SECURE SIXTH AMENDMENT RELIEF ON CONFLICT OF INTEREST GROUNDS, THE CONSTITUTIONAL STANDARD OF REVIEW REQUIRES A SHOWING OF AN ACTUAL CONFLICT

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[12] UNITED STATES V. FOSTER, 469 F.2D 1, 4 N. 2 (1ST CIR. 1972); UNITED STATES V. ALBERTI, 470 F.2D 878, 881 (2ND CIR. 1972), CERT. DENIED, 411 U.S. 919 (1973); CRAIG V. UNITED STATES, 217 F.2D 355, 359 (6TH CIR. 1954); GOODWIN V. CARDWELL, 432 F.2D 521, 522 (6TH CIR. 1970); UNITED STATES EX REL. ROBINSON V. HOUSEWRIGHT, 525 F.2D 988, 994 N. 8 (7TH CIR. 1975); UNITED STATES V. MARSHALL, 488 F.2D 1169, 1192-1193 (9TH CIR. 1973).

ALTHOUGH THE EIGHTH CIRCUIT IN THE PAST MADE NO DISTINCTION BETWEEN RETAINED AND APPOINTED COUNSEL IN JUDGING INEFFECTIVENESS CLAIMS, LARRY BUFFALO CHIEF V. SOUTH DAKOTA, 425 F.2D 271, 279 (8TH CIR. 1970), IT RECENTLY INDICATED THAT THERE MAY WELL BE DIFFERENT CONSTITUTIONAL STANDARDS APPLICABLE. GARTON V. SWENSON, 497 F.2D 1137, 1139 N. 4 (8TH CIR. 1974). SEE ALSO, UNITED STATES V. BOSCH, 584 F.2D 1113, 1123 N. 7 (1ST CIR. 1978).

OF INTEREST OR PREJUDICE.[13] AS THE FIFTH CIRCUIT MAKES CLEAR, IN ALVAREZ, SUPRA, WHENEVER AN ACTUAL CONFLICT OF INTEREST EXISTS, THE TRIAL IS FUNDAMENTALLY UNFAIR AND IPSO FACTO FOURTEENTH AND SIXTH AMENDMENT VIOLATIONS OCCUR.

BY IGNORING THE PRIVATE VERSUS RETAINED COUNSEL DISTINCTION, WHILE SIMULTANEOUSLY APPLYING A TOTALLY INAPPROPRIATE STANDARD OF REVIEW, THE COURT BELOW MISAPPLIED THE UNITED STATES CONSTITUTION. THE COURT ADAMANTLY REFUSED TO INQUIRE INTO THE ACTUAL EXISTENCE OF A CONFLICT OF INTEREST OR PREJUDICE:

> RESPONDENTS ALSO ARGUE THAT ULTIMATELY IT WAS PETITIONER HIMSELF, AND NOT HIS ATTORNEYS, WHO DECIDED NOT TO TAKE THE WITNESS STAND AND THAT HIS DECISION WAS BASED ON PERSONAL CONSIDERATIONS AND NOT INFLUENCED BY DUAL REPRESENTATION. FURTHER, THEY SUBMIT, ONCE PETITIONER HAD DECIDED NOT TO TESTIFY THERE WERE NO WITNESSES WHOSE TESTIMONY WOULD HAVE BEEN WORTHWHILE. ANY COMPLAINT ABOUT THE FAILURE TO PRODUCE DEFENSE WITNESSES IS, IN THEIR JUDGMENT, ILLUSORY. THESE ARGUMENTS ARE ALSO DIRECTED TO THE QUESTION WHETHER THERE WAS ACTUAL PREJUDICE WHICH, AS WE HAVE NOTED, WE MAY NOT CONSIDER.

UNITED STATES EX REL. SULLIVAN V. CUYLER ET AL., APPENDIX, INFRA, AT 19B.

IN SUM, WHETHER OR NOT THE EXCEEDINGLY LIBERAL SIXTH AMENDMENT STANDARD OF REVIEW UTILIZED BELOW IS CONSTITUTIONALLY REQUIRED IN JOINT REPRESENTATION COURT APPOINTMENT CASES, IT CERTAINLY IS ERRONEOUS AS APPLIED TO RESPONDENT HEREIN.

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[13] THE DISTRICT OF COLUMBIA COURT OF APPEALS, WHILE REJECTING THE DISTINCTION, LOLLAR V. UNITED STATES, SUPRA AT 245-246, STILL MANDATES AN INQUIRY INTO THE EXISTENCE OF PREJUDICE IN FACT, ALTHOUGH REQUIRING THE GOVERNMENT TO PROVE ITS ABSENCE.

SINCE RESPONDENT WAS REPRESENTED BY PRIVATELY RETAINED COUNSEL, TRIED SEPARATELY FROM HIS TWO CO-DEFENDANTS, AND AFFORDED REPRESENTATION THAT WAS NEITHER FUNDAMENTALLY UNFAIR NOR SO DEFECTIVE AS TO PUT THE TRIAL COURT OR PROSECUTOR ON NOTICE OF ANY ALLEGED CONFLICT OF INTEREST, ONLY AN ACTUAL CONFLICT OF INTEREST OR PREJUDICE WOULD WARRANT REVERSAL. NO SUCH SHOWING EXISTS ON THIS RECORD.

FOR THE REASONS STATED ABOVE, THIS COURT IS RESPECTFULLY REQUESTED TO ISSUE A WRIT OF CERTIORARI TO THE COURT OF APPEALS FOR THE THIRD CIRCUIT.

III. THE DECISION OF THE COURT BELOW VIOLATED SETTLED PRINCIPLES OF HABEAS CORPUS REVIEW, AS ENUNCIATED BY THIS COURT AND CONGRESS, BY ENCROACHING UPON THE FACTUAL DETERMINATIONS MADE IN THE STATE COURT SYSTEM, AND SUBSTITUTING ITS OWN FINDINGS OF FACT FOR THOSE OF THE STATE COURTS AND THE DISTRICT COURT.

IN TOWNSEND V. SAIN, 372 U.S. 293 (1963), THIS COURT SET FORTH GENERAL STANDARDS GOVERNING HABEAS CORPUS PROCEEDINGS IN FEDERAL COURT. THIS COURT STATED (ID. AT 314-315):

> FURTHERMORE, THE COEQUAL RESPONSIBILITIES OF STATE AND FEDERAL JUDGES IN THE ADMINISTRATION OF FEDERAL CONSTITUTIONAL LAW ARE SUCH THAT WE THINK THE DISTRICT JUDGE MAY, IN THE ORDINARY CASE IN WHICH THERE HAS BEEN NO ARTICULATION, PROPERLY ASSUME THAT THE STATE TRIER OF FACT APPLIED CORRECT STANDARDS OF FEDERAL LAW TO THE FACTS, IN THE ABSENCE OF EVIDENCE ... THAT THERE IS REASON TO SUSPECT THAT AN INCORRECT STANDARD WAS IN FACT APPLIED. THUS, IF THIRD-DEGREE METHODS OF OBTAINING A CONFESSION ARE ALLEGED AND THE STATE COURT REFUSED TO EXCLUDE THE CONFESSION FROM EVIDENCE, THE DISTRICT JUDGE MAY ASSUME THAT THE STATE TRIER FOUND THE FACTS AGAINST THE PETITIONER, THE LAW BEING, THAT THIRD-DEGREE METHODS NECESSARILY PRODUCE A COERCED CONFESSION.

SUBSEQUENT TO TOWNSEND, CONGRESS AMENDED 28 U.S.C. §2254(D) TO PROVIDE IN RELEVANT PART:

> A DETERMINATION AFTER A HEARING ON THE MERITS OF A FACTUAL ISSUE, MADE BY A STATE COURT OF COMPETENT JURISDICTION ... EVIDENCED BY A WRITTEN FINDING, WRITTEN OPINION, OR OTHER RELIABLE AND ADEQUATE WRITTEN INDICIA, SHALL BE PRESUMED TO BE CORRECT, UNLESS THE APPLICANT SHALL ESTABLISH OR IT SHALL OTHERWISE APPEAR, ... -"(1) THAT THE MERITS OF THE FACTUAL DISPUTE WERE NOT RESOLVED IN THE STATE COURT HEARING..."

IN LaVALLEE v. DELLE ROSE, 410 U.S. 690 (1973), THIS COURT FURTHER HELD THAT AN OPINION OF THE STATE TRIAL COURT MEETS THE REQUIREMENT OF 28 U.S.C. §2254(D)(1), IF A DISTRICT COURT CAN REASONABLY CONCLUDE THAT RELIEF WOULD HAVE BEEN GRANTED BY THE STATE COURT IF IT BELIEVED A DEFENDANT'S ALLEGATIONS.

HEREIN, THE CIRCUIT COURT BELOW, WITHOUT ANY ANALYSIS OF THE STATE COURT FACTUAL DETERMINATIONS[14] ON THE CONFLICT OF INTEREST QUESTION, GRANTED THE WRIT BASED ONLY ON THE STATE COURT RECORD. BY REVERSING THE PENNSYLVANIA SUPREME COURT, AS WELL AS THE DISTRICT COURT, SOLELY UPON THE INCONSISTENT AND CONTRADICTED TESTIMONY OF ONE OF RESPONDENT'S TRIAL ATTORNEYS, AND WITHOUT ORDERING AN ADDITIONAL EVIDENTIARY HEARING,[15] THE

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[14] WELL-ESTABLISHED THIRD CIRCUIT DECISIONAL LAW REQUIRES THAT GREAT DEFERENCE BE GRANTED TO STATE FACTUAL DETERMINATIONS. SEE, E.G., SCHMIDT v. HEWITT, 573 F.2D 794 (3RD CIR. 1978) (STATE COURT FACTUAL FINDINGS MUST BE ACCEPTED AS TRUE AND BURDEN ON PETITIONER TO ESTABLISH, BY CLEAR AND CONVINCING EVIDENCE, THAT STATE COURT FACTUAL DETERMINATIONS ARE ERRONEOUS; STATE SUPREME COURT HAS MORE LATITUDE IN REVIEWING TRIAL COURT DETERMINATIONS THAN A FEDERAL COURT DOES IN RULING ON HABEAS CORPUS PETITION); UNITED STATES EX REL. HAYWARD v. JOHNSON, 508 F.2D 322, 329 (3RD CIR.), CERT. DENIED, 422 U.S. 1011 (1975) (WHERE NO INDICATION THAT THE STATE COURT UTILIZED AN IMPROPER CONSTITUTIONAL STANDARD, AND THE FACTS AS RELATED BY PETITIONER WOULD ENTITLE HIM TO RELIEF UNDER THE PREVAILING CONSTITUTIONAL STANDARD, A FEDERAL COURT SHOULD ASSUME THAT THE STATE COURT WOULD PROPERLY APPLY THE LAW IF IT BELIEVED PETITIONER'S STORY; THEREFORE A STATE COURT DECISION DENYING RELIEF IS IN ALL LIKELIHOOD BASED ON DISCREDITING PETITIONER'S TESTIMONY AND ENTITLED TO THE PRESUMPTION OF CORRECTNESS).

[15] SEE, E.G., UNITED STATES EX REL. McNAIR v. STATE OF NEW JERSEY, 492 F.2D 1307 (3RD CIR. 1974) (WHEN LEGAL PROBLEMS ARE PRESENTED WHICH ARE NOT EASILY RESOLVED EVEN ON THE BASIS OF CLEARLY ESTABLISHED FACTS, AN EVIDENTIARY HEARING IS AN A FORTIORI PROPOSITION IF THE STATE RECORD IS DEFICIENT IN CRITICAL AREAS).

COURT SERIOUSLY INTRUDED UPON THE PRINCIPLES OF COMITY AND THE PROPER DEFERENCE WHICH MUST BE GIVEN TO STATE COURT CRIMINAL DETERMINATIONS.

RESPONDENT SOUGHT COLLATERAL RELIEF IN THE STATE COURT SYSTEM UNDER THE PENNSYLVANIA POST CONVICTION HEARING ACT.[16] IN HIS PETITION HE ALLEGED, WITHOUT PROVIDING SUPPORTING FACTS, THAT TRIAL COUNSEL WERE INEFFECTIVE IN FAILING TO PRESENT ANY DEFENSE AND THAT SUCH FAILURE WAS BASED UPON THE DUAL REPRESENTATION INVOLVED. AT THE CONCLUSION OF THE HEARING, THE COURT HELD THAT RESPONDENT WAS NOT DENIED THE EFFECTIVE ASSISTANCE OF COUNSEL, BASED UPON THE TESTIMONY OF JUDGE DiBONA, RESPONDENT'S CHIEF TRIAL COUNSEL.[17] IN REVIEWING THIS DETERMINATION, THE PENNSYLVANIA SUPREME COURT HELD THAT THERE WAS NO CONFLICT OF INTEREST, SINCE THERE WAS NO DUAL REPRESENTATION IN THE TRADITIONAL SENSE, AND THAT RESPONDENT'S CHIEF TRIAL COUNSEL, JUDGE DiBONA, INDICATED THAT HIS STEWARDSHIP WAS IN NO WAY AFFECTED BY THE CONSIDERATION OF THE CO-DEFENDANTS' CASES, BUT WAS SOLELY A PRODUCT OF WHAT HE CONSIDERED TO BE THE BEST COURSE IN HIS REPRESENTATION OF SULLIVAN.[18] THE COURT FURTHER HELD THAT THE DECISION NOT TO PRESENT A DEFENSE WAS BASED UPON

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[16] THE ACT OF JANUARY 25, 1966, P.L. (1965) 1580 §1, 19 P.S. §1180-1 ET SEQ. (SUPPLEMENT 1979).

[17] OPINION OF STATE TRIAL COURT DENYING COLLATERAL RELIEF, APPENDIX, INFRA, AT 7F.

[18] COMMONWEALTH v. SULLIVAN, APPENDIX D. INFRA, AT 34D.

JUDGE DIBONA'S BELIEF THAT THERE WAS INSUFFICIENT EVIDENCE FOR A CONVICTION.[19] THE DISTRICT COURT CONCLUDED THAT THE STATE COURT FINDINGS WERE SUPPORTED BY THE STATE RECORD.[20]

SUCCINCTLY STATED, THE CIRCUIT COURT BELOW GRANTED THE WRIT BY RELYING SOLELY UPON THE CONTRADICTED AND CONTRADICTORY TESTIMONY OF ONE OF RESPONDENT'S ATTORNEYS TO THE EFFECT THAT NO DEFENSE WAS PRESENTED BECAUSE, AMONG OTHER THINGS, THERE WAS A FEAR OF EXPOSING ALLEGED DEFENSE WITNESSES BEFORE THE CO-DEFENDANTS' TRIALS. THE ISSUE UPON WHICH THE COURT BELOW REVERSED THE DISTRICT COURT WAS PRESENTED TO, AND REJECTED BY, THE STATE HEARING COURT AND THE STATE SUPREME COURT. OF NECESSITY, THOSE COURTS RELIED UPON THE TESTIMONY OF JUDGE DIBONA.

SINCE THE STATE COURT DECISIONS WERE SUPPORTED BY THE RECORD TESTIMONY OF JUDGE DIBONA, THE COURT BELOW SHOULD HAVE DENIED RELIEF. THUS, THE COURT'S DECISION DEPARTED FROM SETTLED PRINCIPLES OF HABEAS CORPUS REVIEW WHEN IT IGNORED SUCH TESTIMONY AND ENGAGED IN ITS OWN FACT FINDING. UNITED STATES EX REL. SULLIVAN V. CUYLER ET AL., APPENDIX B, INFRA, AT 15-17B. IF THE COURT DETERMINED THAT THE STATE COURT FINDINGS WERE INCOMPLETE OR INAPPROPRIATE, THE ONLY PROPER REMEDY WAS TO REMAND THE CASE TO THE DISTRICT COURT FOR INDEPENDENT FINDINGS OF FACT AFTER A

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[19] COMMONWEALTH V. SULLIVAN, APPENDIX D, INFRA, AT 34D.

[20] UNITED STATES EX REL. SULLIVAN V. CUYLER, APPENDIX C, INFRA, AT 5-8C.

PLENARY EVIDENTIARY HEARING. TOWNSEND V. SAIN, 372 U.S. 293 (1963); UNITED STATES EX REL. MCNAIR V. STATE OF NEW JERSEY, 492 F.2D 1307 (3RD CIR. 1974); UNITED STATES EX REL. FOYE V. STATE OF NEW JERSEY, 547 F.2D 217 (3RD CIR. 1977).

BECAUSE THE COURT BELOW VIOLATED SETTLED PRINCIPLES OF HABEAS CORPUS REVIEW AS ENUNCIATED BY THIS COURT AND CONGRESS, IT IS RESPECTFULLY REQUESTED THAT THIS COURT ISSUE A WRIT OF CERTIORARI TO REVIEW THE DECISION OF THE COURT OF APPEALS FOR THE THIRD CIRCUIT IN ORDER TO RESTORE COMITY TO ITS PROPER PLACE IN THE CIRCUIT.

CONCLUSION

FOR THE FOREGOING REASONS, THE COMMONWEALTH OF PENNSYLVANIA RESPECTFULLY REQUESTS THAT A WRIT OF CERTIORARI ISSUE TO REVIEW THE DECISION BELOW.

RESPECTFULLY SUBMITTED,

MICHAEL F. HENRY
CHIEF, MOTIONS DIVISION
STEVEN H. GOLDBLATT
DEPUTY DISTRICT ATTORNEY FOR LAW
EDWARD G. RENDELL
DISTRICT ATTORNEY

2400 CENTRE SQUARE WEST
PHILADELPHIA, PENNSYLVANIA 19102

Supreme Court, U. S.
FILED
JUN 7 1979
MICHAEL RODAK, JR., CLERK

IN THE

SUPREME COURT OF THE UNITED STATES

TERM, 197_

NO. ____ 78-1832

JULIUS T. CUYLER, SUPERINTENDENT

AND

DISTRICT ATTORNEY OF PHILADELPHIA,
PETITIONER

V.

JOHN SULLIVAN, RESPONDENT

APPENDIX TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

MICHAEL F. HENRY
CHIEF, MOTIONS DIVISION
STEVEN H. GOLDBLATT
DEPUTY DISTRICT ATTORNEY FOR LAW
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Appendix A

UNITED STATES COURT OF APPEALS

FOR THE THIRD CIRCUIT

No. 78-1411

UNITED STATES OF AMERICA ex rel.
JOHN SULLIVAN,

Appellant,

v.

JULIUS T. CUYLER, Superintendent, State Correctional Institution, Graterford, Pennsylvania, and THE DISTRICT ATTORNEY OF PHILADELPHIA COUNTY

SUR PETITION FOR REHEARING

Present: SEITZ, *Chief Judge,* and ALDISERT, ADAMS, GIBBONS, ROSENN, HUNTER, WEIS, GARTH and HIGGINBOTHAM, *Circuit Judges,* and GERRY, *District Judge.**

The petition for rehearing filed by Appellees in the above entitled case having been submitted to the judges who participated in the decision of this court and to all the other available circuit judges of the circuit in regular active service, and no judge who concurred in the decision having asked for rehearing, and a majority of the circuit judges of the circuit in regular active service not having voted for rehearing by the court in banc, the petition for rehearing is denied.

By THE COURT,

ALDISERT
Judge

Dated: March 12, 1979

* Honorable John F. Gerry, of the United States District Court for the District of New Jersey, sitting by designation.

GARTH, *Circuit Judge,* with whom ADAMS and ROSENN, *Circuit Judges,* join, dissenting from order denying petition for rehearing:

The issue presented by this appeal is whether the appellant Sullivan was deprived of his Sixth Amendment right to effective assistance of counsel, because the privately retained attorneys who represented him at his trial also represented other defendants, who had been charged with Sullivan but who were tried separately and at a date subsequent to Sullivan's conviction of murder. A panel of this court has ordered that a writ of habeus corpus issue, discharging Sullivan from state custody unless the state retries him within a reasonable time. The panel held that this case involved "dual representation" of Sullivan and the defendants in the subsequent trial, and that "[b]ecause we cannot say on this record that the dual representation raised no possibility of prejudice or conflict of interest, however remote, our prior cases compel reversal."

In reaching this conclusion, the panel relied principally on *United States ex rel. Hart v. Davenport,* 478 F.2d 203 (3d Cir. 1973). As in this case, the defendant in *Hart* was represented by privately retained counsel. Recognizing that in the absence of state action, the attorney's ineffective assistance may not be attributed to the state under the fourteenth amendment, as it incorporates the sixth amendment, this Court held in *Hart* that,

> [W]here the questioned conduct of such attorney takes place in the presence of the court or the state attorney, the state action basis for vindication of the alleged fourteenth amendment deprivation is the failure of the state prosecutor or state court to take necessary corrective action.

Id. at 210. Where, however, there is no indication that "the state's attorney or the court had knowledge of the alleged deprivation," or that the proceedings are fundamentally unfair because "the attorney's conduct is so lack-

ing in competence or good faith that it [should have] shocked the conscience of the court or prosecutor as officers of the state," the requisite state involvement is missing. *See id. See also Fitzgerald v. Estelle,* 505 F.2d 1334, 1336-38 (5th Cir. 1975) (en banc). But although state action was found to be present in *Hart,* there would appear to be no evidence in the present case that the trial judge or the prosecutor was aware, or should have been aware, of the alleged conflict of interest. And certainly nothing in the record suggests that Sullivan's representation by two of Philadelphia's best known trial attorneys was so grossly deficient as to render the proceedings fundamentally unfair.

I recognize that judges elsewhere have taken the position that whenever retained counsel's representation is ineffective, state action exists "because the state adjudicatory machinery is inextricably intertwined with the conduct of an accused person's retained attorney." *Fitzgerald, supra,* at 1345 (Godbold, dissenting). But as I understand it, that is not the law in this Circuit or in any other court of appeals. Nor am I convinced that such an approach to the constitutional requirement of state action comports with present Supreme Court guidelines. In any event, if the majority now wishes to renounce the position taken in *Hart* in favor of such a rule, *en banc* consideration would appear to be warranted.

I believe that *en banc* reconsideration is appropriate for a second reason as well. *Hart,* upon which the panel relied in adopting a standard under which a conflict of interest exists whenever there is a possibility of prejudice, established the standard for a *joint,* as distinct from a *dual,* representation case. Joint representation, as I understand it, is the representation by the same attorney of two or more defendants at the same trial. Dual representation, on the other hand, is the representation by the same attorney of two or more defendants, each of whom is tried separately and at different times. Hence, I agree with the panel that *Sullivan* presents a case of dual representation.

But *Hart,* together with all of the other cases upon which the panel has relied, involves joint representation.

I believe that there are significant and relevant distinctions that exist between joint representation cases and dual representation cases, none of which have been explored by the panel. In this statement *sur* petition for rehearing, I do not think it appropriate to explicate all of the differences which exist. That task is for the panel. I think it important, however, to point out that at the very least, actual prejudice must be found before relief may be afforded on a dual representation claim of the type advanced by Sullivan. I do not believe that the *mere possibility of prejudice,* which is the standard under *Hart* for a case involving joint representation, should be woodenly applied in a case where the defendants were tried separately in individual trials. Moreover, I believe that a defendant who claims that his attorney's representation of other persons at different and discrete trials, deprived him of effective assistance of counsel at his *own* trial, must show that he suffered actual prejudice which would have had a material effect on the outcome of his own trial.

Whether or not the "finding" by the *Sullivan* panel of actual prejudice is an appropriate or correct finding in the circumstances of this case does not diminish my concern for the standard enunciated in the opinion. I observe that, prior to this case, we have never established any standard for a dual representation claim, and that to my knowledge, no other Circuit has formulated such a standard. Our decision will affect the conduct of attorneys and litigants in innumerable multi-defendant cases. I therefore believe that it should be the court *en banc* which formulates the appropriate standard for cases involving claims of dual representation.

We should not be oblivious to the practical implications of the panel's decision either. In the wake of *Sullivan,* which disregards the prerequisites articulated in *Hart* for a finding of state action and at the same time permits a

conflict of interest in a dual representation case to be predicated on the mere possibility of prejudice, however remote, it will be necessary for prosecutors and trial court judges within our jurisdiction to insist that co-defendants never be represented by the same privately retained counsel, even when they are to be tried separately. If prosecutors and judges fail to insist upon separate representation, they run the risk of having convictions overturned, as trial strategy decisions by the attorney, which in retrospect may arguably be seen as favoring one of his clients over the other, are attributed to the state for purposes of the sixth and fourteenth amendments, "even if the defense strategy actually chosen would not be subject to attack on the ground of ineffective assistance of counsel had the choice been made by independent counsel." Slip op. at 14-15.

It is for these reasons that I have voted to grant the petition for rehearing.

A True Copy:

Teste:

Clerk of the United States Court of Appeals
for the Third Circuit

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Appendix B

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 78-1411

UNITED STATES OF AMERICA ex rel.
JOHN SULLIVAN,

Appellant,

v.

JULIUS T. CUYLER, Superintendent, State Correctional Institution, Graterford, Pennsylvania, and THE DISTRICT ATTORNEY OF PHILADELPHIA COUNTY,

Appellees.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF PENNSYLVANIA

(D.C. Civil No. 77-2527)

Argued November 16, 1978

Before: ALDISERT and HUNTER, *Circuit Judges,* and GERRY, *District Judge.**

(Opinion filed February 14, 1979)

Marilyn J. Gelb, Esquire
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15th Floor
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Counsel for Appellant

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* Honorable John F. Gerry, of the United States District Court for the District of New Jersey, sitting by designation.

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Counsel for Appellees

OPINION OF THE COURT

GERRY, *District Judge.*

This appeal from the denial of a petition for habeas corpus requires this court to consider again the troubling issue of dual representation of multiple criminal defendants by the same counsel. Petitioner John Sullivan claims, *inter alia,* that he was denied his sixth amendment right to effective assistance of counsel at trial because his attorneys also represented his co-defendants. The district court concluded that there had been no dual representation and denied the petition. We reverse.

I.

Petitioner Sullivan was convicted of two counts of first degree murder in 1967 and sentenced to life imprisonment. He has since then continuously attacked his conviction in state and federal court. Before reaching the merits, we must review the confusing series of direct appeals and collateral attacks that form the record in this case.

On the evening of June 17, 1966, John Gorey, a minor labor union official, and Rita Janda, his female companion, were shot to death in Gorey's office at the Philadelphia headquarters of Teamsters' Local 107. After a medical examiner's inquest on November 3, 1966, petitioner and two others, Gregory Carchidi and Anthony DiPasquale, were arrested and indicted for the murders.

Two attorneys, G. Fred DiBona[1] and A. Charles Peruto, entered appearances on behalf of each of the three defendants. Petitioner, in June, 1967, was the first to come to trial. The defense rested at the close of the Commonwealth's case without presenting any evidence. After the two week trial, the jury convicted petitioner and fixed his punishment at life imprisonment. Carchidi and DiPasquale were later acquitted in separate trials.[2]

A three judge panel of the Court of Common Pleas denied petitioner's post trial motions on July 15, 1968, with one judge voting to grant a new trial. After sentence was imposed, petitioner filed a direct appeal to the Pennsylvania Supreme Court. He also filed an application in the trial court for a Writ of Error Coram Nobis which was denied. His appeal was submitted to the supreme court on briefs on November 26, 1969. On December 29, 1971, an equally divided court affirmed his conviction. *Commonwealth v. Sullivan,* 446 Pa. 419, 286 A.2d 898 (1971). Petitioner, through new counsel, who continues to represent him in this court, twice sought to persuade the supreme court to reconsider its decision. Both applications were denied.[3]

Meanwhile, petitioner Sullivan was not content to await the outcome of his state appeal but launched, without benefit of counsel, a collateral attack upon his conviction by petitioning for habeas corpus relief in federal court. His petitions were dismissed.[4] Appellate review and federal

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1. G. Fred DiBona is now a judge of the Court of Common Pleas in Philadelphia.

2. Carchidi was acquitted after trial on January 26, 1968; DiPasquale on March 14, 1968. Both were represented at trial by Peruto with Judge DiBona assisting him.

3. *See Commonwealth v. Sullivan,* 472 Pa. 129, 180, 371 A.2d 468, 492 (1977) (concurring and dissenting opinion of Pomeroy, J.).

4. *United States ex rel. Sullivan v. Rundle,* No. 69-244 (E.D. Pa., June 12, 1969) and *United States ex rel. Sullivan v. Rundle,* No. 69-452 (E.D. Pa., Sept. 17, 1969), *certificate of probable cause denied,* Misc. No. 1377 (3d Cir., Dec. 31, 1969), were dismissed because petitioner's direct appeal was still pending. *United States ex rel. Sullivan v. Johnson,* Civil Action No. 73-1694 (E.D. Pa., Sept. 11, 1973) was dismissed for failure to exhaust state remedies.

habeas corpus having proved unavailing, petitioner collaterally attacked his conviction in the Pennsylvania courts. On October 30, 1973, counsel filed a petition for post-conviction relief under the Pennsylvania Post-Conviction Hearing Act (PCHA), 19 P.S. § 1180.1 *et seq.* Five days of evidentiary hearings were held on the petition; Sullivan, Carchidi, Peruto, Judge DiBona, the trial judge, and several other witnesses testified. On November 6, 1974, the PCHA court ruled that petitioner had been denied effective assistance of counsel on appeal and permitted him to file a second direct appeal to the Pennsylvania Supreme Court. All other grounds for relief, including those raised here, were rejected.

Petitioner filed his second appeal *nunc pro tunc;* he also appealed from the denial of post-conviction relief on other grounds. The Commonwealth cross-appealed the decision to permit a second direct appeal to be filed. All three appeals were consolidated and argued before the supreme court on January 16, 1975. On February 28, 1977, the court issued an opinion affirming both petitioner's original conviction and the denial of post-conviction relief. *Commonwealth v. Sullivan,* 472 Pa. 129, 371 A.2d 468 (1977).

Having exhausted state remedies,[5] Sullivan filed this petition for habeas corpus in the United States District Court for the Eastern District of Pennsylvania. He alleged the following grounds for relief: (1) that the admission into evidence of color slides of the victims' bodies was a denial of due process; (2) that the factual basis underlying his conviction was so totally devoid of evidentiary support as to deny him due process; (3) that defense counsel had a conflict of interest because they also represented his two co-defendants; (4) that counsel was ineffective for failing to object to certain testimony; (5) that counsel was ineffective for failing to reserve objections to the of-

5. Respondents concede in their brief that petitioner has exhausted state remedies.

fering of a secret memorandum to the trial judge; (6) that the trial judge erred in his instructions to the jury so as to deny due process; and (7) that the failure of the prosecution to disclose to the defense certain evidence denied him due process. The petition was referred to a United States magistrate for report and recommendation. The magistrate found that all grounds except dual representation were without merit. He recommended that the writ issue because petitioner's trial counsel also represented his co-defendants and the record disclosed a possibility of prejudice or conflict of interest arising from this dual representation.

The district judge denied the petition. He accepted the magistrate's recommendations on every ground asserted except dual representation. As to that ground, he adapted the conclusion of the Pennsylvania Supreme Court that there had been no dual representation. He also found that no conflict of interest actually existed. Petitioner appeals from this order. Because we believe reversal is compelled on the issue of dual representation and conflict of interest, we do not reach the other grounds asserted.[6]

II.

The evidence underlying petitioner's conviction was entirely circumstantial. The Pennsylvania Supreme Court summarized it in the light most favorable to the Commonwealth as follows:

> The chief prosecution witness, one Francis McGrath, was employed as a janitor at the union hall where the bodies were eventually discovered. On July 17, 1966, he arrived at work approximately 6:00 P.M. and parked his automobile in the lot adjacent to the building. At that time, he specifically observed two

6. Although we viewed the color slides of the victims' bodies which were introduced at trial, we need not decide whether their admission into evidence denied petitioner his constitutional right to a fair trial. No doubt the court on retrial will be better placed to consider this close evidentiary question which has twice divided the state supreme court.

other vehicles on the premises. One was owned by appellant and the other was being used at the time by one Anthony DiPasquale. After alighting from his car, McGrath noticed appellant looking out onto the parking lot from the window of a second floor office normally used by other union officials. The witness then entered the building and proceeded to the second floor to commence his duties. Appellant was still seated by the window when McGrath entered that office. Sullivan inquired about the janitor's presence and instructed McGrath to wait until Sunday night to clean, since a union meeting was scheduled for that date and the building would require cleaning after the gathering. McGrath ignored the suggestion and continued collecting the trash from the offices. The witness then took the refuse outside the building. When he returned, appellant was still seated at the window.

At this time, both Sullivan and McGrath observed John Gorey and Rita Janda arrive at the union hall in Gorey's car and enter the building. McGrath then began cleaning the conference room, located approximately 75 feet from Gorey's office. Shortly thereafter, Gorey appeared and had a brief conversation with McGrath. Immediately after Gorey left the conference room, appellant appeared in the doorway, through which Gorey had just passed, and again questioned McGrath about the cleaning and suggested he defer his activities until Sunday afternoon. During this brief conversation, Gregory Carchidi, another janitor, entered the conference room. No conversation ensued between Carchidi and Sullivan but Carchidi repeated appellant's urgings to leave the work until Sunday. Sullivan then left the room through the same door which Gorey had exited but Carchidi remained and seated himself behind the desk.

Within several minutes, the witness testified he heard sounds like firecrackers going off in rapid succession. McGrath started to question Carchidi about the disturbance but was abruptly instructed to "Get out of the building and don't say nothing" (sic). McGrath left the union hall and noticed four cars other than his own parked in the lot. These were recognized as belonging to DiPasquale, Gorey, Carchidi and appellant. McGrath drove off but returned to the premises within 15 minutes. Only Gorey's car remained in the lot. Upon re-entering the building, he found the offices closed, the conference room locked and the lights out.

The victims' bodies were discovered the following morning. Gorey had been shot four times and Janda six times, the shots being fired from close range. The ballistics studies established two separate guns were employed in the homicides but the weapons were never recovered.

Additional testimony disclosed that the telephone lines had been arranged so that regular incoming calls would ring in the room in which appellant was seated. A second line with a different call number had been prearranged by Gorey to ring in his office so that he could receive an anticipated call from Joseph Vernick at 7:00 P.M. One Irene Glenn testified for the Commonwealth that she dialed the regular union phone number about 6:15 P.M. that evening and a man answered identifying himself as Gorey. A scrap paper found in the wastebasket alongside the desk where appellant had been seated prior to the victim's arrival contained Ms. Glenn's name and telephone number. It was uncontested that the handwriting was that of appellant. Moreover, one Joseph Vernick testified that he called Gorey's office at a specially arranged time but received no answer despite his repeated attempts between 7:15 and 8:15 P.M. This evidence, coupled with the medical examiner's testimony, indicated that the time of death could have been approximately 7:15 P.M.

Commonwealth v. Sullivan, supra, 472 Pa. at 147-49, 371 A.2d at 477. *See also Commonwealth v. Sullivan, supra,* 446 Pa. at 424-27, 286 A.2d at 898-900.

Petitioner did not testify and no evidence was introduced on his behalf.

III.

Our first task is to determine whether there was dual representation: that is, whether petitioner was in fact represented by an attorney or attorneys who also represented one or both of his co-defendants. The Pennsylvania Supreme Court considered this issue on petitioner's second appeal and decided:

> Appellant first claims that he was denied effective assistance of trial counsel because his attorneys also represented two co-defendants who were tried separately for the crime . . . .
>
> Upon review of the record from the PCHA proceedings, we find appellant has failed to prove the requisite elements of his claim. First, the testimony establishes that there was no dual representation in the true sense of the term, i.e., the same counsel actively represented co-defendants. Mr. Peruto testified that it was Mr. (now Judge) DiBona who served as chief counsel for appellant during trial and made all decisions relevant to Sullivan's defense while he, Peruto, was merely assisting. These functions were reversed at the trial of the co-defendants where Mr. Peruto was chief counsel and Judge DiBona the assistant. Thus, Judge DiBona served only a minor role in the trial of the co-defendants while devoting his primary efforts to the Sullivan case. This conclusion is supported by Judge DiBona's statements that his stewardship was in no way affected by the consideration of the co-defendant's cases but was solely a product of what he considered to be the best course in his representation of Sullivan. We therefore hold that there is absolutely no evidence that a conflict existed.

472 Pa. at 161-62, 371 A.2d at 483.

Respondents urge that this conclusion is a finding of fact by a state court after a full hearing which is entitled to a presumption of correctness and should be accepted by this court. Petitioner argues that we should reject it because the record as a whole does not support the supreme court's factual determination. The magistrate accepted petitioner's position while the district judge accepted respondents'. We believe both were mistaken in their approach to this problem. While it is true that state court factual findings are entitled to deference in this court unless they are not fairly supported by the record as a whole, the Supreme Court has defined "facts" very narrowly in this context. In *Townsend v. Sain,* 372 U.S. 293, 309 n.9 (1963), the principal case on the scope of federal court review of state findings on habeas corpus, the Court defined the findings entitled to deference as follows:

> By "issues of fact" we mean to refer to what are termed basic, primary, or historical facts: facts "in the sense of a recital of external events and the credibility of their narrators . . . ." So called mixed questions of fact and law, which require the application of a legal standard to the historical-fact determinations, are not facts in this sense. (Citation omitted.)

The Court went on to emphasize:

> Although the district judge may, where the state court has reliably found the relevant facts, defer to the state court's findings of fact, he may not defer to its findings of law. It is the district judge's duty to apply the applicable federal law to the state court findings independently.

362 U.S. at 318.

Properly speaking the supreme court's conclusion that there was no dual representation was not a finding of fact but a legal conclusion—the application of a legal standard to the facts developed on the record. We conclude that there was dual representation in this case.

Both Judge DiBona and Peruto entered appearances on behalf of petitioner and his two co-defendants shortly after their arrest and indictment. Sullivan had been represented at the inquest by another attorney but could not afford to retain him to represent him on the murder charge. Sullivan testified at the PCHA hearing that while he was imprisoned awaiting trial, he discussed his inability to afford counsel with his two co-defendants who told him they had already made arrangements with "Mr. Peruto and his partner" (Judge DiBona was not identified to petitioner at this time), and that they would represent all three defendants. They told him not to worry, and he agreed to the arrangement. Neither Sullivan nor his family paid any counsel fee to Judge DiBona and Peruto.[7]

A unified defense was prepared. One investigation was conducted on behalf of all three defendants. On numerous occasions the three defendants met jointly with both attorneys and discussed the preparation of a defense. The three defendants also met the investigator hired by counsel together and discussed their defense.

When Sullivan came to trial, Judge DiBona was his principal trial counsel who made opening and closing speeches and examined witnesses.[8] Peruto, by prearrangement, assisted him. Judge DiBona considered that he and Peruto were "associate counsel" at this trial and at the trials of the two co-defendants. Peruto was present at

7. The matter of who paid these privately retained attorneys was never developed at the PCHA hearing. Apparently, friends of the defendants raised money from contributions and "selling chances," i.e., holding a lottery. What other sources of funds there may have been remains unclear.

8. It is unclear how it was decided that Judge DiBona would be chief trial counsel. Peruto testified that a meeting was held at which each defendant was asked which lawyer he would prefer to try his case, and Sullivan chose Judge DiBona because of his greater age and experience. Sullivan denied this. He claims to have had no idea that one lawyer was to have principal responsibility for his case; he considered them equally involved in the trial.

counsel table throughout the trial. He examined prospective jurors on voir dire. During the trial, he consulted with petitioner, and he and Judge DiBona frequently conferred on matters of trial strategy. He argued motions and objections to the court virtually every day of the trial. After the Commonwealth had completed its proofs, petitioner and counsel had a lengthy private conference on defense strategy, at which Peruto advised petitioner not to testify and not to present witnesses in his defense; this course was eventually chosen. After the verdict was returned, Peruto argued the penalty phase of trial to the jury, which under Pennsylvania law decides between life imprisonment and death in first degree murder cases.

The state court based its finding that there was no dual representation on its assessment of Peruto's role in petitioner's defense. It concluded that his role was so minor that he did not represent Sullivan and that the defense was the sole responsibility of Judge DiBona. We believe that an attorney who enters an appearance on behalf of a criminal defendant, consults with him confidentially for the purpose of preparing a defense, investigates his case, aids in the pretrial preparation of his defense, appears at his trial, participates in the selection of the jury that is to decide his fate, argues motions and objections, confers with co-counsel on trial strategy, offers the defendant legal advice, including advice on whether he should testify or present evidence in his defense, and argues the issue of penalty, a matter of life and death, to the jury on the defendant's behalf must be said to represent that defendant and owe to him all the duties an attorney owes to a client in a criminal case. We find that Peruto represented Sullivan as well as Carchidi and DiPasquale.

The state court also based its finding of no dual representation on the assumption that Judge DiBona played such a minor role in the trials of the other two defendants that he could be said to represent Sullivan alone. This conflicts with Judge DiBona's understanding of his role; he testified that he and Peruto were "associate counsel in all

three cases." It also overlooks the fact that while Peruto eventually acted as principal trial counsel to both Carchidi and DiPasquale that this arrangement was made after Sullivan's trial. At the Sullivan trial, Judge DiBona told the court that he also represented Carchidi, to whom he referred as "my other client," while Peruto represented that he was counsel to DiPasquale as well as co-counsel to Sullivan. Thus, at the time of petitioner's trial—which is the critical time—Judge DiBona saw himself as "chief counsel" not only to Sullivan, but to his co-defendant Carchidi as well, and Peruto shared this view.

Whatever may have been the extent of each attorney's participation in the trials of the various defendants, we are satisfied that it was sufficient to establish that both attorneys represented all three defendants. Petitioner was represented by two attorneys, both of whom also represented his two co-defendants and who seem to have viewed themselves as a defense "team" acting on behalf of all three of the accused.

IV.

A finding of dual representation does not, without more, require reversal. The standard for determining whether representation of co-defendants by the same attorney is a denial of sixth amendment rights was set in this circuit in *Walker v. United States*, 422 F.2d 374, 375 (3d Cir.) (per curiam), *cert. denied*, 399 U.S. 915 (1970).

> [R]epresentation of co-defendants by the same attorney is not tantamount to the denial of effective assistance of counsel guaranteed by the sixth amendment. There must be some showing of a possible conflict of interest or prejudice, however remote, before a reviewing court will find the dual representation constitutionally defective.

Numerous recent cases in this circuit have repeated this standard and made clear that actual prejudice or conflict

of interest need not be shown.[9] The mere possibility, however remote, is sufficient.

This rule recognizes that "[t]he right to counsel guaranteed by the sixth and fourteenth amendments contemplates the services of an attorney devoted solely to the interests of his client." *United States ex rel. Hart v. Davenport*, 478 F.2d 203, 209 (3d Cir. 1973). Anything less must be regarded as an infringement of the right to counsel. And the Supreme Court has said: "The right to have the assistance of counsel is too fundamental and absolute to allow courts to indulge in nice calculations as to the amount of prejudice arising from its denial." *Glasser v. United States*, 315 U.S. 60, 75-76 (1942).

The *Walker* rule also recognizes that after the fact it is often difficult or impossible to determine whether a defendant has been prejudiced by dual representation. Dual representation interferes with an attorney's independent professional judgment. The harm is often in what it tends to prevent an attorney from doing on behalf of his client. *Holloway v. Arkansas*, 435 U.S. 475, 489-90 (1978). For example, an attorney with divided loyalties cannot negotiate a plea agreement on behalf of one client which includes an agreement by that client to testify against a co-defendant the attorney also represents. *Id.* He may refrain from introducing evidence favorable to one client but harmful to another; or he may refrain from challenging evidence that harms one client but is helpful to another. These and similar conflicts of interest ordinarily do not appear in the record. The Supreme Court recently discussed this problem in *Holloway v. Arkansas, supra*, and noted:

> In the normal case where a harmless error rule is applied, the error occurs at trial and its scope is readily

9. *United States v. Levy*, 577 F.2d 200 (3d Cir. 1978); *United States v. Dolan*, 570 F.2d 1177 (3d Cir. 1978); *United States ex rel. Horta v. DeYoung*, 523 F.2d 807 (3d Cir. 1975) (per curiam); *United States ex rel. Hart v. Davenport*, 478 F.2d 203 (3d Cir. 1973); *United States v. Rispo*, 470 F.2d 1099 (3d Cir. 1973); *United States v. Donovan*, 464 F.2d 495 (3d Cir.), *cert. denied*, 409 U.S. 1044 (1972); *Government of the Virgin Islands v. John*, 447 F.2d 69 (3d Cir. 1971); *United States ex rel. Small v. Rundle*, 442 F.2d 235 (3d Cir. 1971); *United States ex rel. Darrah v. Brierley*, 415 F.2d 9 (3d Cir. 1969).

identifiable. Accordingly, the reviewing court can undertake with some confidence its relatively narrow task of assessing the likelihood that the error materially affected the deliberations of the jury. But in a case of joint representation of conflicting interests the evil—it bears repeating—is in what the advocate finds himself compelled to *refrain* from doing, not only at trial but also as to possible pretrial plea negotiations and in the sentencing process. It may be possible in some cases to identify from the record the prejudice resulting from an attorney's failure to undertake certain trial tasks, but even with a record of the sentencing hearing available it would be difficult to judge intelligently the impact of a conflict on the attorney's representation of a client. And to assess the impact of a conflict of interests on the attorney's options, tactics and decisions in plea negotiations would be virtually impossible. Thus, an inquiry into a claim of harmless error here would require, unlike most cases, unguided speculation.

435 U.S. at 490-91.

Even where the attorney has failed to undertake certain trial tasks, it is difficult to determine whether prejudice has resulted. For decisions not to offer evidence, or interpose objections, and so forth, may well be legitimate tactical decisions if made by independent counsel. If made by counsel with divided loyalties, they are suspect because a reviewing court cannot reliably determine to what extent the decisions were based on legitimate tactical considerations and to what extent they were the result of impermissible consideration of the best interests of other clients. Accordingly, this court has held that a state conviction cannot stand when an examination of the record reveals that representation by independent counsel "might have made a difference in defense strategy." *United States ex rel. Horta v. DeYoung*, 523 F.2d 807, 809 (3d Cir. 1975) (per curiam). This is so even if the defense strategy actually

chosen would not be subject to attack on the ground of ineffective assistance of counsel had the choice been made by independent counsel.

Our examination of the record convinces us that there is in this case at least a possibility of prejudice or conflict of interest and that independent counsel might well have chosen a different trial strategy. Therefore, prior decisions of this court compel reversal.

The critical decision counsel made in this case was to rest at the close of the Commonwealth's case without presenting petitioner's testimony or other evidence on his behalf. Although we have little doubt that this would have been a legitimate tactical decision if made by independent counsel,[10] in this case it raises a possibility of prejudice or conflict of interest. The potential for conflict inherent in this situation is vividly demonstrated by Peruto's testimony at the PCHA hearing on the subject of why no defense had been presented.

> Q. Well, at any rate you had made a decision not to present any testimony anyway, hadn't you?
>
> A. In the Sullivan trial?
>
> Q. The Sullivan case, yes.
>
> A. Yes. I can recall the great discussions that we had with Sullivan where we were so convinced that—and we communicated this to Sullivan——
>
> THE COURT: When you say great discussion, you mean lengthy discussion?
>
> THE WITNESS: Lengthy discussion, yes, sir. Where we felt that he couldn't possibly be convicted and, therefore, what's the sense in exposing the defense because we had two more defendants to try.
>
> BY [petitioner's counsel]:
>
> Q. Wait——

10. Indeed, the Pennsylvania Supreme Court evenly divided on the issue of whether the evidence was sufficient to support a conviction. *Commonwealth v. Sullivan*, *supra*, 446 Pa. 419, 286 A.2d 898 (1971).

A. And I'm afraid Sullivan suffered by that fact.

Q. Wait just a minute, sir. You were concerned with the other two defendants you represented; is that correct?

A. Yes. Why expose your defense if you've got two more people to come to trial and the Commonwealth has not presented a case?

Q. So that entered into your consideration as to whether or not you presented a defense in the Sullivan case?

A. Sure, it did. When we're talking about back and forth. For example, I've heard Judge DiBona testify today, and, yes, we were sort of playing devil's advocate. I didn't want the defense to go on because I thought we would only be exposing the defendant witnesses for the other two trials that were coming up. . . . And as I look back on that, although it was not my thought that John Sullivan should be short-changed in any fashion, I'm afraid that it was my thought that I was over-solicitous for the other two defendants being ready to be tried.

He further testified that he opposed calling three witnesses who had been in the vicinity of Local 107 headquarters at the time the crime was alleged to have occurred because "I . . . recall that I felt that it might be dangerous because one of the other two defendants leaving in a hurry might have been seen by those three witnesses and it might have damaged that defendant and it might have come out on the cross-examination of those witnesses in Sullivan's case."

Sullivan's PCHA hearing testimony confirms Peruto's recollection. He testified that at the close of the Commonwealth's proofs, he met with both his attorneys and they discussed whether a defense should be offered and whether he should testify. The reasons offered to him for not doing so were that in counsel's opinion there was not enough evidence to convict him, and there was no reason to risk using evidence that might harm his co-defendants. Peruto told

him "there was no sense in putting anything on that may hurt the other two [defendants] because we've got this case won."

Respondents do not argue here, as they did in the court below, that Peruto's testimony is unworthy of belief, perhaps because they rely upon it so heavily in support of their contention that there was no dual representation. They do urge us, however, to accept Judge DiBona's explanation instead. He testified that the final decision not to present a defense was made jointly by petitioner and counsel. His decision to advise that course, he testified, was not in any way based upon a desire to protect his other clients, but was entirely based upon his professional judgment that the Commonwealth had not proved its case. Respondents argue that "[t]he testimony clearly shows that appellant's decision that no defense evidence be presented was based on counsel's view, with which appellant concurred, that the Commonwealth had simply not presented sufficient evidence to obtain a conviction."

We believe this analysis is seriously flawed. It is undisputed that Peruto participated in the decision not to present a defense. He advised petitioner not to testify and suggested to co-counsel that witnesses not be called. No reason or evidence is offered to explain why an attorney would make the damaging admission of professional impropriety we have quoted were it not true. And Sullivan (albeit not a disinterested witness) corroborates his testimony. We have no basis on which to reject Peruto's sworn admission that he injected improper considerations into the attorney-client relationship.

We believe that Peruto's testimony illustrates in the plainest possible terms the potential for conflict of interest. The evidence in this case was scant. What little there was was jealously guarded by the opposing attorneys from premature disclosure. Although counsel owed a duty to petitioner to produce any available evidence which would in their judgment aid his defense, they also owed a duty to

his co-defendants not to tip their hand to the Commonwealth. At this trial both parties took maximum advantage of the element of surprise. There was at least a potential conflict among the defendants as to which would receive the benefit of this tactic.

Moreover, by asking us to rule that counsel's decision not to present a defense was a legitimate tactical decision, made in good faith on sound professional judgment by Judge DiBona, respondents are asking us to decide that there was in fact no prejudice. This misses the point. The standard requires us to determine whether there is a possibility of prejudice or conflict of interest, *however remote.* To hold, in the face of this record, that there was not such a possibility would be to, in effect, overrule a long line of cases in this circuit and require a showing of actual prejudice. This we cannot do.

There is also other evidence of conflict of interest in this record. A critical thread in the Commonwealth's web of circumstantial evidence was the statement allegedly made to McGrath by Carchidi: "Get out of the building and don't say nothing." This statement was admitted into evidence as a declaration by a co-conspirator.[11] It could only have been rebutted by the testimony of Carchidi. At the PCHA hearing, Carchidi testified that he had not made the statement and was available, and willing, to so testify at Sullivan's trial, but counsel had told him his testimony was unnecessary because the evidence was insufficient to convict. The trial record suggests, however, that the decision not to call Carchidi as a witness may have been made before the close of the Commonwealth's case. Peruto argued to the trial judge that the statement was inadmis-

11. Argument over the admissibility of this statement at trial centered on whether or not it was a co-conspirator declaration. On the first direct appeal, the Pennsylvania Supreme Court ruled that it was admissible under the spontaneous utterance or res gestae exception to the hearsay rule and did not decide whether it was a declaration by a co-conspirator, 446 Pa. at 439, 286 A.2d at 906. The court abandoned this view on the second direct appeal and ruled that it was admissible as a co-conspirator declaration and declined to reach any other grounds. 472 Pa. at 159-60, 371 A.2d at 482-3. This is, of course, the final decision of the Pennsylvania courts on this point of state evidence law.

sible because it could only be refuted by Carchidi "and you can't put Carchidi on the record." This suggests to us that counsel may have decided against using Carchidi as a witness before they knew whether or not the Commonwealth's proofs were sufficient.

Both of petitioner's attorneys owed a duty to Carchidi to protect him against possible self-incrimination. They could not have sought to compel him to testify if it were against his interest to do so. We think this situation was much like that presented in *United States v. Levy,* 577 F.2d 200, 211 (3d Cir. 1978), where this court held that the fact that a criminal defendant had "waived his right to present a witness on his behalf on the basis of advice from an attorney who owed an obligation to that witness, an obligation which may well have conflicted with the attorney's duty of loyalty to [the defendant]" would require a reversal of the conviction "even under a rule requiring a finding of prejudice." These attorneys owed a duty of loyalty to Carchidi which may well have conflicted with the duty they owed petitioner.

Respondents also argue that ultimately it was petitioner himself, and not his attorneys, who decided not to take the witness stand and that his decision was based on personal considerations and not influenced by dual representation. Further, they submit, once petitioner had decided not to testify there were no witnesses whose testimony would have been worthwhile. Any complaint about the failure to produce defense witnesses is, in their judgment, illusory. These arguments are also directed to the question whether there was actual prejudice which, as we have noted, we may not consider. We think there are other reasons for rejecting them as well.

As to the first argument, it is not at all clear on this record that petitioner did make the ultimate decision not to testify. His hearing testimony was that:

> A. I had nothing to do with the decision. It was given to me point blank. And Mr. Peruto, after like

> I say hours of discussion, Mr. Peruto said something to the effect of, "Look, we're the attorneys. You don't know anything about law"—I'm not quoting him verbatim, I'm using my own language—and your life is in my hands and we're out to protect it, and you're not to worry, that you'll be acquitted and we're assured that you'll be acquitted. And I said, "Look, you got it, you got the ball, carry it."

Even had petitioner himself made the ultimate decision not to testify, it is plain that his decision was made on the advice of counsel. For it is undisputed that at least one of his lawyers strongly urged him not to testify. Following this advice can hardly be considered an independent decision that bars petitioner from later complaining of the dual representation that rendered the advice itself suspect. *See United States v. Levy, supra,* 577 F.2d at 210-11. Indeed it is the very fact that petitioner followed the course suggested by counsel that creates the possibility of prejudice.

The contention that there were no witnesses whose testimony would have been useful requires us to speculate as to what witnesses who have never testified, some of whom are now deceased, would have said and whether independent counsel would have used their testimony. This we cannot do. Indeed, it is the purpose of the *Walker-Hart* rule to avoid such speculation. Judge DiBona, in his opening statement to the jury, offered to produce evidence on petitioner's behalf. Why counsel chose not to present this evidence, and whether independent counsel would have done otherwise, are matters about which we cannot speculate. It is sufficient that independent counsel might have acted differently.

V.

We find that there was in this case dual representation of petitioner Sullivan and his co-defendants. Because we cannot say on this record that the dual representation

raised no possibility of prejudice or conflict of interest, however remote, our prior cases compel reversal. We do not reach the other grounds asserted.

The order of the district court will be reversed and the case remanded with a direction that the writ of habeas corpus should issue discharging the petitioner John Sullivan from state custody unless within a reasonable time fixed by the district court he is afforded a new trial.

A True Copy:

Teste:

Clerk of the United States Court of Appeals
for the Third Circuit

(A.O. U. S. Courts, International Printing Co., Phila., Pa.)

APPENDIX C

ORDER AND OPINION OF THE DISTRICT COURT INCORPORATING IN PART AND REJECTING IN PART THE REPORT AND RECOMMENDATION OF THE UNITED STATES MAGISTRATE

ORDER

DAVIS, S.J.

AND NOW THIS 2ND DAY OF FEBRUARY, 1978, AFTER CAREFUL AND INDEPENDENT CONSIDERATION OF RELATOR'S PETITION FOR A WRIT OF HABEAS CORPUS, AND AFTER REVIEW OF THE REPORT AND RECOMMENDATION OF THE UNITED STATES MAGISTRATE, IT IS ORDERED THAT:

1. THE REPORT IS APPROVED AND ADOPTED INSOFAR AS IT IS NOT IN CONFLICT WITH THE ACCOMPANYING OPINION OF THE COURT.

2. THE RECOMMENDATION IS REJECTED.

3. THE PETITION FOR A WRIT OF HABEAS CORPUS IS DENIED.

4. THERE EXISTS PROBABLE CAUSE FOR APPEAL.

/S/ JOHN MORGAN DAVIS, J.

MEMORANDUM AND ORDER

DAVIS, S.J.

JOHN SULLIVAN, RELATOR IN THIS HABEAS CORPUS ACTION, WAS CONVICTED BY A JURY IN PHILADELPHIA COUNTY, PENNSYLVANIA, ON JUNE 19, 1967 OF TWO COUNTS OF FIRST DEGREE MURDER FOR THE KILLINGS OF JOHN GOREY AND RITA JANDA, WHICH TOOK PLACE ON

JUNE 17, 1966. AFTER EXHAUSTING HIS STATE REMEDIES, HE HAS COME BEFORE THIS COURT SEEKING HABEAS CORPUS RELIEF, AND ASSERTING NUMEROUS REASONS THEREFOR.

ON NOVEMBER 3, 1977, UNITED STATES MAGISTRATE EDWIN E. NAYTHONS FILED A LENGTHY AND COMPREHENSIVE REPORT TO THIS COURT RECOMMENDING THAT A WRIT OF HABEAS CORPUS BE GRANTED THE RELATOR, AS A SINGLE ONE OF HIS SEVEN CONTENTIONS APPEARED TO BE MERITORIOUS. THAT CONTENTION WAS THAT DEFENSE COUNSEL HAD A CONFLICT OF INTEREST BECAUSE HE ALSO REPRESENTED TWO OTHER PERSONS CHARGED WITH THE SAME CRIME. AS TO RELATOR'S OTHER SIX ALLEGATIONS OF GROUNDS FOR RELIEF, MAGISTRATE NAYTHONS REPORTED THAT THEY WERE WITHOUT MERIT. AFTER CAREFUL AND INDEPENDENT CONSIDERATION OF RELATOR'S PETITION FOR A WRIT OF HABEAS CORPUS, I HAVE CONCLUDED THAT THE MAGISTRATE'S REPORT IS CORRECT AS TO THOSE SIX OTHER CONTENTIONS, BUT I MUST DISAGREE WITH THE RECOMMENDATION THAT THE CONFLICT OF INTEREST CLAIM IS VALID. THEREFORE, I AM ADOPTING THE MAGISTRATE'S REPORT, WHICH IS INCLUDED HEREIN AS AN APPENDIX, INSOFAR AS IT IS NOT IN CONFLICT WITH THIS OPINION WHICH WILL BE CONCERNED SOLELY WITH THE QUESTION OF TRIAL COUNSEL'S ALLEGED CONFLICT OF INTEREST.

A BRIEF FACTUAL BACKGROUND CONCERNING THE CIRCUMSTANCES OF THE ALLEGED CONFLICT MIGHT BE OF VALUE AT THIS TIME. RELATOR WAS CHARGED WITH THE OFFENSE ALONG WITH TWO OTHER MEN, GREGORY CARCHIDI AND ANTHONY DIPASQUALE. BEFORE TRIAL, ATTORNEYS A. CHARLES PERUTO AND G. FRED DIBONA WERE APPOINTED TO REPRESENT

THE THREE CO-DEFENDANTS. ACCORDING TO MR. PERUTO'S TESTIMONY AT THE POST CONVICTION HEARING ACT (PCHA) HEARING, HE AND MR. DIBONA GAVE THE THREE DEFENDANTS THE CHOICE AS TO WHICH ATTORNEY WOULD BE PRIMARILY RESPONSIBLE FOR THE CONDUCT OF THEIR RESPECTIVE TRIALS. SULLIVAN CHOSE DIBONA BECAUSE OF HIS AGE AND EXPERIENCE. THE OTHER TWO BOTH CHOSE PERUTO. (N.T. APRIL 25, 1974, 108-109).

MR. SULLIVAN NOW ALLEGES, BASED ON TESTIMONY ELICITED AT THE PCHA HEARING (SEE, INFRA) THAT MR. PERUTO PLACED THE INTERESTS OF THE OTHER TWO DEFENDANTS ABOVE THOSE OF RELATOR IN MAKING THE DECISION NOT TO PRESENT A DEFENSE. DESPITE MR. PERUTO'S TESTIMONY ON THIS ISSUE, THE FACTS AS FOUND IN THE ENTIRE RECORD OF THIS CASE UNQUESTIONABLY REBUT RELATOR'S ASSERTION.

AS MAGISTRATE NAYTHONS CORRECTLY POINTS OUT IN HIS EXCELLENT REPORT AT PAGE 39, "A DEFENDANT IS ENTITLED TO THE UNTRAMMELED AND UNIMPAIRED ASSISTANCE OF COUNSEL FOR HIS DEFENSE." Id. (CITATIONS OMITTED). ALSO, "'THE RIGHT TO COUNSEL GUARANTEED BY THE SIXTH AND FOURTEENTH AMENDMENTS CONTEMPLATES THE SERVICE OF AN ATTORNEY DEVOTED SOLELY TO THE INTERESTS OF HIS CLIENT,'" AND "THE RIGHT TO COUNSEL 'REQUIRES NOTHING LESS THAN THE UNDIVIDED LOYALTY OF COUNSEL IN BEHALF OF HIS CLIENT.'" Id. AT 40 (CITATIONS OMITTED).

NOW, IN ORDER TO FIND THAT REPRESENTATION, AS ALLEGED HERE, WAS CONSTITUTIONALLY DEFECTIVE, WE MUST EXAMINE TWO ISSUES:

1. WAS THERE, IN FACT, DUAL REPRESENTATION?

THAT IS, DID THE SAME COUNSEL ACTIVELY REPRESENT TWO INDIVIDUALS WITH POSSIBLY COMPETING INTERESTS? AND,

2. WAS THERE A SHOWING OF POSSIBLE CONFLICT OF INTEREST OR PREJUDICE, HOWEVER REMOTE?

ON THESE ISSUES THE PENNSYLVANIA SUPREME COURT HELD AS FOLLOWS:

> "THE TESTIMONY ESTABLISHES THAT THERE WAS NO DUAL REPRESENTATION IN THE TRUE SENSE OF THE TERM, I.E., THE SAME COUNSEL ACTIVELY REPRESENTED CO-DEFENDANTS. MR. PERUTO TESTIFIED THAT IT WAS MR. (NOW JUDGE) DIBONA WHO SERVED AS CHIEF COUNSEL FOR APPELLANT DURING TRIAL AND MADE ALL DECISIONS RELEVANT TO SULLIVAN'S DEFENSE, WHILE HE, MR. PERUTO, WAS MERELY ASSISTING. THESE FUNCTIONS WERE REVERSED AT THE TRIAL OF THE CO-DEFENDANTS WHERE MR. PERUTO WAS CHIEF COUNSEL AND JUDGE DIBONA THE ASSISTANT. THUS, JUDGE DIBONA SERVED ONLY A MINOR ROLE IN THE TRIAL OF THE CO-DEFENDANTS WHILE DEVOTING HIS PRIMARY EFFORTS TO THE SULLIVAN CASE, THIS CONCLUSION IS SUPPROTED BY JUDGE DIBONA'S STATEMENTS THAT HIS STEWARDSHIP WAS IN NO WAY AFFECTED BY HIS CONSIDERATION OF THE CO-DEFENDANT'S CASES, BUT WAS SOLELY A PRODUCT OF WHAT HE CONSIDERED TO BE THE BEST COURSE IN HIS REPRESENTATION OF SULLIVAN. WE THEREFORE HOLD THAT THERE IS ABSOLUTELY NO EVIDENCE THAT A CONFLICT EXISTED. COMMONWEALTH V. SULLIVAN, 371 A.2D 468, 483 (1977).

28 U.S.C. §2254(D)(8) PROVIDES THAT IN HABEAS CORPUS PROCEEDINGS FACTUAL DETERMINATIONS MADE BY THE STATE COURT ARE PRESUMED TO BE CORRECT UNLESS THE FEDERAL COURT "ON CONSIDERATION OF SUCH PART OF THE RECORD AS A WHOLE CONCLUDES THAT SUCH FACTUAL DETERMINATION IS NOT FAIRLY SUPPORTED BY THE RECORD." Id. THEREFORE IT IS MY DUTY TO INDEPENDENTLY EXAMINE THE RECORD, AND DETERMINE IF IT SUPPORTS THE FACTUAL CONCLUSIONS OF THE PENNSYLVANIA SUPREME COURT.

AN EXAMINATION OF THE RECORD OF THE SULLIVAN TRIAL CONFIRMS THAT JUDGE DIBONA WAS THE PRIMARY TRIAL COUNSEL. MAGISTRATE NAYTHONS PLACES GREAT EMPHASIS ON THE FACT THAT MR. PERUTO PARTICIPATED FROM TIME TO TIME IN THE CONDUCT OF THE SULLIVAN TRIAL, PARTICULARLY WHEN THE QUESTION OF SENTENCING WAS AT ISSUE. SEE, MAGISTRATE'S REPORT PP. 43-44. I DO NOT BELIEVE THESE ISOLATED INCIDENTS WARRANT THE IMPORTANCE ASSIGNED THEM BY THE MAGISTRATE. IT IS HARDLY SURPRISING, CONSIDERING MR. PERUTO'S REPUTATION AS AN OUTSTANDING TRIAL COUNSEL, THAT MR. DIBONA WOULD RELY ON HIM OCCASIONALLY TO EXERCISE HIS VAUNTED POWERS OF PERSUASION. INDEED, ONE MIGHT HAVE EVEN CONSIDERED MR. DIBONA FOOLISH HAD HE NOT MADE USE OF MR. PERUTO'S TALENTS, AS THEY WERE PRESENT AND AVAILABLE TO HIM AT THE TRIAL. IN ANY EVENT, THE RECORD CONCLUSIVELY ILLUSTRATES THAT IT WAS DIBONA WHO CARRIED THE BURDEN OF TRIAL COUNSEL, WHILE PERUTO MERELY ACTED AS HIS ASSISTANT. THEREFORE, I ACCEPT THE CONCLUSION OF FACT OF THE PENNSYLVANIA SUPREME COURT THAT THERE WAS NO DUAL REPRESENTATION.

HAVING FOUND THAT NO DUAL REPRESENTATION EXISTED, IT IS UNNECESSARY TO EXAMINE THE QUESTION OF WHETHER ANY CONFLICT OF INTEREST ACTUALLY EXISTED. SEE, E.G. UNITED STATES EX REL. SMALL V. RUNDLE, 442 F.2D 235, 237 (3D. CIR. 1971). HOWEVER, I WILL EXAMINE THE ISSUE FOR THE SAKE OF A MORE COMPLETE RECORD.

RELATOR CONTENDS THAT DEFENSE COUNSELS' DECISION NOT TO PERMIT HIM TO TESTIFY IN HIS OWN BEHALF, AND TO PRESENT NO OTHER EVIDENCE, WAS MOTIVATED, NOT BY A CAREFUL ASSESSMENT OF

HIS BEST INTEREST, BUT BY A DESIRE ON THE PART OF COUNSEL NOT TO REVEAL DEFENSE STRATEGY TO BE USED IN THE TRIALS OF THE OTHER TWO DEFENDANTS. IN SUPPORT OF THIS ALLEGATION, RELATOR PRESENTS THE FOLLOWING TESTIMONY WHICH WAS GIVEN BY MR. PERUTO AT THE POST CONVICTION HEARING:

> "Q. WAIT JUST A MINUTE, SIR. YOU WERE CONCERNED WITH THE OTHER TWO DEFENDANTS YOU REPRESENTED: IS THAT CORRECT?
>
> A. (BY MR. PERUTO) YES. WHY EXPOSE YOUR DEFENSE IF YOU HAVE TWO MORE PEOPLE TO COME TO TRIAL AND THE COMMONWEALTH HAS NOT PRESENTED A CASE?
>
> Q. SO THAT ENTERED INTO YOUR CONSIDERATION AS TO WHETHER OR NOT YOU PRESENTED A DEFENSE IN THE SULLIVAN CASE?
>
> A. SURE IT DID." (N.T. PCHA, APRIL 25, 1974 P. 101).

THIS, HOWEVER, IS THE ONLY TESTIMONY WHICH INDICATES EVEN THE POSSIBILITY OF A CONFLICT, AND IS WELL REFUTED BY THE RECORD WHICH SHOWS THAT IT WAS JUDGE DIBONA WHO WAS CHIEF COUNSEL AND MADE ALL OF THE DECISIONS OF THIS NATURE, AND BY JUDGE DIBONA'S OWN TESTIMONY THAT HE WAS NOT INFLUENCED IN ANY WAY BY CONSIDERATIONS CONCERNING THE OTHER DEFENDANTS. (N.T. PCHA, AUG. 6, 1974, PP. 79, 83).

THE REASON THAT SULLIVAN DID NOT TESTIFY IS CLEAR FROM THE RECORD-HE DELIBERATELY CHOSE NOT TO TESTIFY BECAUSE HE BELIEVED THERE WAS INSUFFICIENT EVIDENCE TO CONVICT HIM, AND BECAUSE HE WANTED TO AVOID EMBARRASSMENT TO HIMSELF AND HIS FAMILY WHICH MIGHT HAVE COME FROM REVELATION OF PAST INDISCRETIONS. SULLIVAN TESTIFIED DURING THE PCHA HEARING THAT HE AT ALL TIMES WANTED TO

TESTIFY AT THE TRIAL, AND PRESENT OTHER EVIDENCE. BUT THIS CONTENTION IS SIMPLY NOT BORNE OUT BY THE RECORD. ONLY SULLIVAN'S CO-DEFENDANT CARCHIDI (HARDLY A PILLAR OF CREDIBILITY UNDER THE CIRCUMSTANCES,) CONFIRMED SULLIVAN'S CONTENTION. AND SULLIVAN'S VERSION WAS DIRECTLY CONTRADICTED BY BOTH OF HIS TRIAL COUNSEL. JUDGE DIBONA TESTIFIED THAT SULLIVAN DID NOT WISH TO TESTIFY IN HIS OWN BEHALF AND COULD NOT BE PERSUADED TO DO SO BY COUNSEL, (N.T. PCHA APRIL 24, 1974, 10-11). MR. PERUTO CONFIRMED JUDGE DIBONA'S RECOLLECTION THAT IT WAS SULLIVAN'S DECISION NOT TO TESTIFY. EVEN SULLIVAN HIMSELF TESTIFIED ON CROSS-EXAMINATION AT THE PCHA HEARING THAT THE REASON HE DID NOT TESTIFY WAS BECAUSE, "THERE WAS NO EVIDENCE..." (N.T. PCHA MARCH 25, 1974, P. 215). FURTHERMORE, THERE WAS TESTIMONY ELICITED FROM SULLIVAN AT THE HEARING THAT EVIDENCE CONCERNING HIS PERSONAL LIFE WHICH MIGHT HAVE BEEN BROUGHT TO LIGHT HAD HE TAKEN THE STAND WOULD HAVE CAUSED HIM GREAT EMBARRASSMENT. (N.T. PCHA MARCH 25, 1974, PP. 212-215). CONSEQUENTLY, THE CONCLUSION IS INESCAPABLE THAT THE DECISION TO KEEP SULLIVAN OFF OF THE WITNESS STAND WAS MADE BY SULLIVAN HIMSELF, AND HE CANNOT NOW CLAIM THAT HIS COUNSEL WAS INEFFECTIVE FOR FAILING TO FORCE HIM TO TESTIFY.

FURTHER, THE RECORD REVEALS THE REASONS JUDGE DIBONA DID NOT CALL ANY OTHER DEFENSE WITNESSES. FIRST, HE DID NOT BELIEVE THAT THE COMMONWEALTH HAD PROVEN ITS CASE. SECOND, NONE OF THE WITNESSES WHICH RELATOR NOW CONTENDS WOULD HAVE HELPED GAIN HIS

ACQUITTAL WERE CONSIDERED OF ANY VALUE BY JUDGE DIBONA FOR REASONS WHICH ARE WELL DOCUMENTED IN HIS TESTIMONY OF APRIL 24, 1974. AND THIRD, CALLING THESE OTHER WITNESSES WOULD MERELY HAVE SERVED TO HIGHLIGHT SULLIVAN'S FAILURE TO TESTIFY HIMSELF. IT IS OBVIOUS FROM THE RECORD THAT THE DECISION NOT TO PUT ON ANY DEFENSE WITNESSES WAS A TACTICAL DECISION, MADE WITH THE BEST INTEREST OF RELATOR IN MIND.

FOR THE ABOVE STATED REASONS, AND FOR THE REASONS WELL STATED IN THE MAGISTRATE'S REPORT AND RECOMMENDATION, I FIND IT NECESSARY TO DENY THIS PETITION FOR A WRIT OF HABEAS CORPUS.

/S/ JOHN MORGAN DAVIS, J.

REPORT - RECOMMENDATION

EDWIN E. NAYTHONS
UNITED STATES MAGISTRATE

NOVEMBER 1, 1977

JOHN SULLIVAN, RELATOR, HAS FILED THIS PETITION FOR A WRIT OF HABEAS CORPUS FOLLOWING HIS CONVICTION BY A JURY IN PHILADELPHIA COUNTY, PENNSYLVANIA, OF MURDER IN THE FIRST DEGREE.[1] RELATOR WAS CONVICTED ON JUNE 19, 1967, AND THE PUNISHMENT WAS FIXED AT TWO CONSECUTIVE LIFE SENTENCES IN THE DEATHS OF JOHN GOREY AND RITA JANDA WHICH TOOK PLACE ON JUNE 17, 1966. FOLLOWING DENIAL OF MOTIONS FOR A NEW TRIAL AND IN ARREST

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[1] COMMONWEALTH OF PENNSYLVANIA V. JOHN SULLIVAN, COURT OF COMMON PLEAS, TRIAL DIVISION, CRIMINAL SECTION, PHILADELPHIA COUNTY, NOVEMBER SESSIONS 1966, NUMBERS 190-93.

OF JUDGMENT, JUDGMENT OF SENTENCE WAS IMPOSED AS THE JURY DIRECTED. AN APPEAL WAS TAKEN TO THE SUPREME COURT OF PENNSYLVANIA WHERE THE JUDGMENT OF SENTENCE WAS AFFIRMED BY AN EVENLY DIVIDED COURT. COMMONWEALTH V. SULLIVAN, 446 PA. 419 (1971).

RELATOR WAS REPRESENTED AT TRIAL BY THE HONORABLE G. FRED DIBONA AND A. CHARLES PERUTO, ESQUIRE. ON OCTOBER 30, 1973, RELATOR FILED A PETITION UNDER THE PENNSYLVANIA POST-CONVICTION HEARING ACT, 19 P.S. §1180-1 ET SEQ. AND AN AMENDED PETITION WAS FILED ON FEBRUARY 27, 1974, ALLEGING

(1) INEFFECTIVE ASSISTANCE OF COUNSEL;

(2) DENIAL OF RIGHT TO APPEAL;

(3) THAT THE TRIAL COURT ERRED IN INSTRUCTING THE JURY;

(4) INDICTMENTS WERE BASED ON PERJURED TESTIMONY;

(5) IMPROPER INTRODUCTION OF A STATEMENT OF AN ALLEGED CO-CONSPIRATOR;

(6) THE CONVICTION WAS BASED ON INSUFFICIENT EVIDENCE;

(7) AN INCULPATORY STATEMENT WAS ILLEGALLY INTRODUCED;

(8) ADMISSION OF PREJUDICIAL TESTIMONY REGARDING RELATOR'S REQUEST FOR AN ATTORNEY;

(9) THE IMPROPER DISPLAY OF INFLAMMATORY PICTURES;

(10) THE JUDGE'S RECEIPT OF SECRET EVIDENCE FROM THE DISTRICT ATTORNEY.

AFTER A LENGTHY HEARING BEFORE THE HONORABLE ETHAN ALLEN DOTY ON NOVEMBER 6, 1974, THE COURT GRANTED RELATOR LEAVE TO FILE AN APPEAL NUNC PRO TUNC TO THE PENNSYLVANIA SUPREME COURT AND TO FILE BRIEFS AND PRESENT ORAL ARGUMENT; THE PETITION FOR RELIEF UNDER THE POST-CONVICTION HEARING ACT WAS OTHERWISE DENIED. THE RELATOR AND THE COMMONWEALTH APPEALED FROM THIS ORDER.

RELATOR APPEALED TO THE SUPREME COURT OF PENNSYLVANIA ALLEGING INEFFECTIVE ASSISTANCE OF COUNSEL ON APPEAL. THE COMMONWEALTH ALSO APPEALED FROM THE ORDER GRANTING LEAVE TO FILE A SECOND APPEAL. THE SUPREME COURT HELD THAT THE EVIDENCE WAS SUFFICIENT TO SUSTAIN THE POST-CONVICTION HEARING COURT'S FINDING THAT COUNSEL'S FAILURE TO FILE AN ADEQUATE BRIEF AND TO ARGUE THE APPEAL ORALLY DEPRIVED RELATOR OF EFFECTIVE ASSISTANCE OF APPELLATE COUNSEL IN HIS INITIAL APPEAL, AND THUS LEAVE TO FILE A SECOND APPEAL WAS APPROPRIATELY GRANTED. FURTHER, THE COURT FOUND THAT THE EVIDENCE WAS SUFFICIENT TO SUSTAIN RELATOR'S CONVICTION AND THAT THE TRIAL COURT DID NOT ERR IN ADMITTING INTO EVIDENCE COLOR SLIDES DEPICTING THE BODIES OF THE DECEASED. THE COURT ALSO HELD THAT SULLIVAN WAS EFFECTIVELY REPRESENTED BY COUNSEL AT TRIAL AND THAT JUDGE DOTY PROPERLY DISMISSED RELATOR'S OTHER CLAIMS. SULLIVAN V. COMMONWEALTH, 371 A.2D 468 (PA. 1977).

IN THE PRESENT PETITION FOR FEDERAL HABEAS CORPUS RELIEF RELATOR ALLEGES THE FOLLOWING GROUNDS:

(1) THE ADMISSION INTO EVIDENCE OF COLOR SLIDES WAS A DENIAL OF DUE PROCESS;

(2) THAT THE FACTUAL DATA UNDERLYING RELATOR'S CONVICTION WAS SO TOTALLY VOID OF EVIDENTIARY SUPPORT AS TO VIOLATE DUE PROCESS;

(3) DEFENSE COUNSEL HAD A CONFLICT OF INTEREST BECAUSE HE ALSO REPRESENTED TWO OTHER PERSONS CHARGED WITH THE SAME CRIME;

(4) COUNSEL WAS INEFFECTIVE BY FAILING TO OBJECT TO CERTAIN TESTIMONY;

(5) COUNSEL WAS INEFFECTIVE IN FAILING TO RESERVE OBJECTIONS TO THE OFFERING OF A SECRET MEMORANDUM TO THE TRIAL JUDGE;

(6) THE TRIAL JUDGE ERRED IN INSTRUCTING THE JURY ON DEGREE OF GUILT, AMOUNTING TO A DENIAL OF DUE PROCESS;

(7) THE FAILURE OF THE PROSECUTION TO DISCLOSE CERTAIN EVIDENCE DENIED HIM DUE PROCESS OF LAW.

THE EVIDENCE UPON WHICH THE CONVICTION WAS BASED

THE CONVICTION AROSE FROM THE EVENTS OF THE EVENING OF JUNE 17, 1966, AT WHICH TIME JOHN GOREY A UNION OFFICIAL OF TEAMSTER'S UNION LOCAL 107, AND HIS GIRLFRIEND, RITA JANDA, WERE THE VICTIMS OF AN ASSASSINATION-TYPE HOMICIDE CARRIED OUT IN GOREY'S OFFICE ON THE SECOND FLOOR OF THE LOCAL'S UNION HALL AND OFFICE BUILDING IN PHILADELPHIA, PENNSYLVANIA.

WE ADOPT THE SUPREME COURT OF PENNSYLVANIA'S STATEMENT OF THE FACTS AS AN ACCURATE AND ADEQUATE SUMMARY AS FOLLOWS:

"TWO FIREARMS WERE USED IN KILLING EACH OF THE VICTIMS, AND SHOTS FROM BOTH WEAPONS WERE FOUND IN EACH OF THE BODIES. THE WEAPONS WERE NEVER FOUND. NO FELONY OTHER THAN THE HOMICIDES WERE INVOLVED, AND THERE WERE NO WITNESSES TO THE KILLING, SO THAT THE COMMONWEALTH'S CASE WAS BASICALLY PRESENTED AND PREDICATED UPON CIRCUMSTANTIAL EVIDENCE.

"...ALL OF THE CIRCUMSTANCES CONSIDERED BY THE JURY AND DESCRIBED BY THE WITNESSES COVERED A SHORT PERIOD, ROUGHLY BETWEEN 5:55 P.M. AND 7:13 P.M., ON THE EVENING OF THE KILLING. THE DEFENDANT OFFERED NO EVIDENCE, SO THAT THE TESTIMONY PRESENTED BY THE COMMONWEALTH WAS SUBMITTED TO THE JURY WITHOUT CONTRADICTION.

"THE COMMONWEALTH'S PRINCIPAL WITNESS, FRANCIS MCGRATH, A MEMBER OF THE LOCAL, HAD BEEN EMPLOYED BY THE UNION AS JANITOR IN THE BUILDING INVOLVED AT THE TIME OF THE HOMICIDES, AND HAD HELD OFFICIAL POSITIONS IN THE UNION IN THE PAST. MCGRATH TESTIFIED THAT HE ARRIVED ON THE PREMISES AT ABOUT 5:55 P.M., AT WHICH TIME THE BUILDING'S PARKING LOT WAS VACANT EXCEPT FOR TWO AUTOMOBILES; THE DEFENDANT'S AND THAT OF ANOTHER MEMBER OF THE UNION, GREGORY CARCHIDI,[2] WHO WAS ALSO EMPLOYED BY THE LOCAL AS A JANITOR. THE DEFENDANT, SULLIVAN, AN OFFICIAL OF LOCAL 107, WAS THEN SITTING AT A DESK BESIDE A WINDOW IN THE SECOND STORY

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[2] CARCHIDI WAS ACQUITTED OF THE CHARGE OF MURDER AND CONSPIRACY BY A JURY ON JANUARY 26, 1968, AS WAS ANTHONY DI PASQUALE ON MARCH 14, 1968.

OFFICE OF ANOTHER UNION OFFICIAL. FROM THE WINDOW SULLIVAN HAD A VIEW OF THE PARKING LOT, AND HIS POSITION AT THE WINDOW WAS MAINTAINED WHILE MCGRATH ENTERED THE BUILDING, WENT UP TO THAT OFFICE ON THE SECOND FLOOR AND BEGAN HIS JANITORIAL WORK THERE. THE SWITCHBOARD FOR THE TELEPHONE LINES HAD BEEN ARRANGED FOR THE NIGHT SO THAT THE LINE LISTED AND USED FOR INCOMING CALLS HAVING TO DO WITH REGULAR UNION BUSINESS WAS PLUGGED IN TO RING THE EXTENSION TELEPHONE IN THE ROOM WHERE SULLIVAN WAS SITTING. ANOTHER LINE WITH A DIFFERENT CALL NUMBER HAD BEEN SET UP BY THE SWITCHBOARD OPERATOR TO RING IN GOREY'S ROOM, BY PREARRANGEMENT WITH GOREY'S KNOWLEDGE, SO THAT JOSEPH VERNICK, WHO WISHED TO SPEAK WITH GOREY, COULD REACH HIM BY CALLING THAT NUMBER AFTER 7 P.M. THAT EVENING. AS MCGRATH STARTED HIS CLEANING WORK, SULLIVAN ASKED HIM WHY HE WAS CLEANING THE BUILDING ON THIS NIGHT, WHICH WAS A FRIDAY, AND SUGGESTED THAT HE WAIT UNTIL SUNDAY NIGHT TO DO THE CLEANING, POINTING OUT THAT A UNION MEETING WAS SCHEDULED FOR SUNDAY DURING THE DAYTIME, SO THAT THE PLACE WOULD REQUIRE CLEANING AFTER THAT MEETING. THE VICTIMS, GOREY AND JANDA, ARRIVED BETWEEN 6:10 AND 6:15 P.M. AND WENT TO GOREY'S OFFICE ON THE SECOND FLOOR. THE WITNESS CONTAINUED (SIC) EMPTYING TRASH BASKETS AND WORKING HIS WAY FROM ONE ROOM TO THE NEXT AROUND THE SECOND STORY, GOING FROM THE OFFICE IN WHICH SULLIVAN WAS SITTING TO THE CONFERENCE ROOM WHICH WAS NEXT, BUT FOR AN AREAWAY, TO THE OFFICE IN WHICH THE VICTIMS THEN WERE.

"WHILE MCGRATH WAS IN THE CONFERENCE ROOM THE FOLLOWING THINGS HAPPENED: JOHN GOREY CAME IN AND HAD A CONVERSATION (WHICH IS NOT RELEVANT), AND LEFT. 'IN A MATTER OF SECONDS, A HALF A MINUTE' AFTER GOREY LEFT THE CONFERENCE ROOM, SULLIVAN ENTERED AND SAID AGAIN, 'WHY DON'T YOU LET IT GO UNTIL AFTER THE MEETING', SPEAKING OF THE CLEANING WORK THAT MCGRATH WAS DOING. THERE FOLLOWED A CONVERSATION WITH SULLIVAN ABOUT SOMETHING THAT JOHN GOREY HAD SAID, DURING WHICH CARCHIDI CAME INTO THE CONFERENCE ROOM AT A TIME ESTIMATED TO BE A MATTER OF A MINUTE OR TWO AFTER SULLIVAN HAD MADE HIS ENTRANCE.

"UPON CARCHIDI'S ENTRANCE NO GREETINGS WERE EXCHANGED BETWEEN HIM AND SULLIVAN. IN FACT, NEITHER OF THEM MADE ANY COMMENT TO THE OTHER. INSTEAD, CARCHIDI SPOKE DIRECTLY TO MCGRATH, STATING IN SULLIVAN'S PRESENCE JUST ABOUT WHAT SULLIVAN HAD JUST SAID: '...LEAVE THE CLEANING GO UNTIL SUNDAY AFTER THE MEETING.' SULLIVAN THEN LEFT THE CONFERENCE ROOM. MCGRATH TESTIFIED THAT SULLIVAN'S DEPARTURE WAS 'FROM THREE TO FIVE MINUTES, APPROXIMATELY', AFTER GOREY HAD LEFT; THAT HE THEN CONTINUED HIS CLEANING, AND THAT CARCHIDI 'REMINDED ME AGAIN TO LET THE CLEANING GO UNTIL AFTER SUNDAY.' IT WAS AT THIS POINT THAT MCGRATH HEARD 'WHAT I BELIEVED TO BE FIRECRACKERS... I HEARD A LOT OF NOISE, LOUD REPORTS, WHICH I THOUGHT WERE FIRECRACKERS...JUST LIKE I SAID, YOUR HONOR, IT WAS A BUNCH OF NOISES SIMULTANEOUSLY. DON'T KNOW HOW TO SAY THE WORD, BUT IF YOU LIGHT A WHOLE PACK OF FIRECRACKERS AND

THROW THEM ON THE FLOOR AND THEY WOULD GO OFF ONE RIGHT AFTER ANOTHER.' IN THIS CHARGED ATMOSPHERE MCGRATH TURNED TO CARCHIDI WHO WAS SEATED IN THE CHAIR BEHIND HIM AND EXCLAIMED, 'WHAT WAS THAT?' WHEREUPON CARCHICI (SIC) STATED, 'GET OUT OF THE BUILDING AND DON'T SAY NOTHING'. MCGRATH GOT OUT OF THE BUILDING AND NOTICED THAT THE CARS THAT HAD BEEN ON THE PARKING LOT PREVIOUSLY, GOREY'S, SULLIVAN'S AND CARCHIDI'S, WERE STILL THERE, BUT AT THIS TIME THERE WAS ANOTHER CAR ALSO ON THE LOT. MCGRATH FIXED THE TIME OF HIS DEPARTURE AS BETWEEN 7:05 AND 7:15 P.M. HE TESTIFIED THAT, BECAUSE OF HIS HASTY DEPARTURE, DOORS TO THE ROOMS ON THE SECOND FLOOR WHERE HE HAD BEEN WORKING HAD BEEN LEFT OPEN AND THE LIGHTS WERE LEFT ON WHEN HE LEFT THE BUILDING. HE RETURNED 15 TO 20 MINUTES LATER AND OBSERVED THAT THE AUTOMOBILES OF SULLIVAN AND CARCHIDI, AND THE THIRD CAR, HAD VACATED THE PARKING LOT, LEAVING ONLY THE AUTOMOBILE OF JOHN GOREY; IN ADDITION, ALL OF THE DOORS INSIDE THE BUILDING HAD BEEN CLOSED, AND ALL OF THE LIGHTS HAD BEEN TURNED OFF. THE DOOR TO THE CONFERENCE ROOM WHICH HAD BEEN LEFT OPEN WAS NOW CLOSED AND LOCKED.

"OTHER WITNESSES GAVE TESTIMONY WHICH SERVED TO ADD IMPORTANT THREADS AND DETAILS IN THE FABRIC OF CIRCUMSTANTIAL EVIDENCE. FOR EXAMPLE, WHEN IRENE GLENN TELEPHONED, DIALING IN ON THE PRINCIPAL TELEPHONE LINE OF THE UNION (WHICH LINE, AS PREVIOUSLY NOTED HAD BEEN SET UP TO RING AT THE DESK WHERE SULLIVAN WAS THEN SITTING), THE CALL WAS ANSWERED BY ONE WHO

STATED THAT HE WAS GOREY. HER RECOLLECTION WAS THAT THIS RECIPIENT OF HER CALL GAVE HIS NAME AS 'BILL' GOREY; AND, WHILE SHE WAS NOT SURE WHICH FIRST NAME HE GAVE, SHE WAS QUITE POSITIVE THAT THE LAST NAME GIVEN WAS 'GOREY'. IT WAS UNCONTESTED THAT SULLIVAN HAD WRITTEN HER NAME AND TELEPHONE NUMBER ON A CERTAIN YELLOW SHEET OF PAPER WHICH WAS FOUND IN THE WASTE BASKET IN THAT OFFICE. COUPLED WITH THIS WAS THE FACT THAT HER CALL WAS AT 6:15 P.M., JUST SHORTLY AFTER THE VICTIMS HAD ARRIVED.

"JOSEPH VERNICK, TRYING TO REACH GOREY, MADE HIS CALL TO THE NUMBER WHICH WAS GIVEN TO HIM BY THE UNION'S TELEPHONE SWITCHBOARD OPERATOR, ESTHER SNYDER. SHE TESTIFIED THAT SHE HAD PLUGGED THIS LINE INTO GOREY'S OFFICE WITH HIS KNOWLEDGE, SO THAT, PRESUMABLY, HE WAS EXPECTING THE CALL WHICH REMAINED UNANSWERED THAT EVENING, APPARENTLY AFTER HIS AND RITA JANDA'S DEATHS. VERNICK RANG THROUGH ON THIS LINE TO GOREY'S TELEPHONE SEVERAL TIMES, RECEIVING NO ANSWER, OVER A PERIOD FROM 7:15 TO 8:15 P.M."

I.

THE SUFFICIENCY OF THE EVIDENCE

RELATOR URGES THAT THE EVIDENCE SET FORTH ABOVE WAS INSUFFICIENT TO SUSTAIN A VERDICT OF FIRST DEGREE MURDER. IN THIS CASE, THE COMMONWEALTH RELIED TOTALLY ON CIRCUMSTANTIAL EVIDENCE. OF COURSE, CIRCUMSTANTIAL EVIDENCE IN ITSELF MAY BE SUFFICIENT TO ESTABLISH BOTH THE COMMISSION OF A CRIME AND THE ACCUSED'S PARTICIPATION IF THE INFERENCES ARISING FROM THE

EVIDENCE ESTABLISH THESE FACTS BEYOND A REASONABLE DOUBT. COMMONWEALTH v. COX, 460 PA. 566, 333 A.2D 917 (1975); COMMONWEALTH v. ALSTON, 461 PA. 664, 337 A.2D 597 (1975). MOREOVER, IT IS NOT NECESSARY THAT EACH PIECE OF EVIDENCE BE LINKED TO THE DEFENDANT BEYOND A REASONABLE DOUBT. IT IS ONLY NECESSARY THAT EACH PIECE OF EVIDENCE INCLUDE THE DEFENDANT IN A GROUP WHO COULD BE LINKED WHILE EXCLUDING OTHERS, AND THAT THE COMBINATION OF EVIDENCE LINKED THE DEFENDANT TO THE CRIME BEYOND A REASONABLE DOUBT (EMPHASIS SUPPLIED). COMMONWEALTH v. PETRISKO, 442 PA. 575, 580, 275 A.2D 46, 49 (1971). SEE ALSO COMMONWEALTH v. TINSLEY, 465 PA. 329, 350 A.2D 791 (1976). AS STATED, THE FACTS AND CIRCUMSTANCES NEED NOT BE ABSOLUTELY INCOMPATABLE (SIC) WITH DEFENDANT'S INNOCENCE, BUT THE QUESTION OF ANY DOUBT IS FOR THE JURY UNLESS THE EVIDENCE "BE SO WEAK AND INCONCLUSIVE THAT AS A MATTER OF LAW NO PROBABILITY OF FACT CAN BE DRAWN FROM THE COMBINED CIRCUMSTANCES." COMMONWEALTH v. LIBONATI, 346 PA. 504, 508, 31 A.2D 95, 97 (1943). SEE ALSO COMMONWEALTH v. ROGOZINSKI, 387 PA. 399, 402, 128 A.2D 28, 30 (1956). MY REVIEW OF THE STATE COURT'S FINDINGS DEALING WITH THIS PART OF THE CASE INDICATES THAT AN ANALYSIS OF THE FACTS SUPPORTS THE JURY'S FINDINGS. SULLIVAN HAD REMAINED AT THE WINDOW LOOKING OUT ONTO THE PARKING LOT FOR MORE THAN TWENTY (20) MINUTES AFTER MCGRATH'S ARRIVAL, INDICATING THAT HE WAS AWAITING THE ARRIVAL OF A PARTICULAR INDIVIDUAL. SULLIVAN DID

NOT LEAVE THAT OBSERVATION POINT UNTIL HE HAD SEEN THE VICTIMS ARRIVE, STRONGLY SUGGESTING THAT IT WAS IN FACT GOREY AND JANDA WHOSE ARRIVAL HE WAS AWAITING. THE EVIDENCE FURTHER JUSTIFIES AN INFERENCE THAT SULLIVAN ATTEMPTED TO CONCEAL HIS IDENTITY AND PRESENCE BY ANSWERING THE TELEPHONE AS "GOREY". MOREOVER, HE ATTEMPTED TO PERSUADE MCGRATH TO LEAVE THE PREMISES BY REPEATEDLY SUGGESTING THAT THE CLEANING BE LEFT UNTIL SUNDAY. SUCH CONDUCT IS HIGHLY CONSISTENT WITH AN ATTEMPT TO AVOID THE POSSIBILITY OF ANY WITNESSES TO THE ANTICIPATED EVENT.

THIS CONCLUSION IS BUTTRESSED BY THE ACTIONS OF CARCHIDI, A CO-DEFENDANT, WHO ENTERED THE CONFERENCE ROOM AND WITHOUT ENGAGING IN DISCUSSION WITH RELATOR, ALSO INSTRUCTED MCGRATH TO DEFER HIS DUTIES UNTIL SUNDAY. ALMOST IMMEDIATELY THEREAFTER, RELATOR EXITED THE CONFERENCE ROOM THROUGH THE SAME DOORWAY WHICH GOREY HAD PREVIOUSLY DEPARTED, AND WAS (SIC) LED TOWARDS GOREY'S OFFICE, THE SCENE OF THE MURDERS. MOMENTARILY, THE SHOTS WERE HEARD AND CARCHIDI TOLD MCGRATH TO "...GET OUT OF THE BUILDING AND DON'T SAY NOTHING" (SIC). A REASONABLE INFERENCE WAS PROPERLY DRAWN BY THE JURY THAT THE REPETITION AND SIMILARITY OF THESE STATEMENTS TO MCGRATH BY RELATOR AND CARCHIDI JUST PRIOR TO THE SHOOTINGS WAS INDICATIVE OF THEIR KNOWLEDGE OF THE IMPENDING INCIDENT AND FURTHER EVIDENCED THEIR ATTEMPTS TO REMOVE ANY POTENTIAL WITNESSES TO THE CRIME.

ADDITIONAL EVIDENCE OF GUILT WAS ALSO PROPERLY INFERRED FROM RELATOR'S STATEMENT TO POLICE. DURING QUESTIONING SEVERAL DAYS AFTER THE MURDERS, SULLIVAN DENIED BEING PRESENT AT THE BUILDING DURING THE TIME OF THE SHOOTINGS. THIS CONTRADICTED MCGRATH'S STATEMENT WHICH PLACED SULLIVAN IN DIRECT PROXIMITY TO THE CRIME ONLY MOMENTS BEFORE ITS OCCURRENCE. MOREOVER, MCGRATH STATED THAT WHEN HE LEFT THE BUILDING SULLIVAN'S CAR WAS STILL PARKED IN THE LOT.

DISCUSSION

IT IS CLEAR THAT WE CANNOT REVIEW THE SUFFICIENCY OF THE EVIDENCE IN SUPPORT OF RELATOR'S CONVICTION AT A FEDERAL HABEAS CORPUS PROCEEDING. THE QUESTION PRESENTED TO A FEDERAL COURT BY SUCH A CLAIM, IN THE WORDS OF THOMPSON V. CITY OF LOUISVILLE, 362 U.S. 199 (1960) IS WHETHER:

> "...THE CHARGES...WERE SO TOTALLY DEVOID EVIDENTIARY SUPPORT AS TO RENDER (THE) CONVICTION UNCONSTITUTIONAL UNDER THE DUE PROCESS CLAUSE OF THE FOURTEENTH AMENDMENT. DECISION ON THIS QUESTION TURNS NOT ON THE SUFFICIENCY OF THE EVIDENCE, BUT ON WHETHER THE CONVICTION RESTS UPON ANY EVIDENCE AT ALL." SEE ALSO UNITED STATES OF AMERICA EX REL. FINEBERG V. RUNDLE, 444 F.2D 402 (3RD CIR. 1971); UNITED STATES EX REL. JOHNSON V. RUNDLE, 280 F. SUPP. 453 (E.D. PA.) AFF'D 404 F.2D 42 (3RD CIR. 1968), CERT DENIED, 395 U.S. 937 (1969). (EMPHASIS ADDED.)

CLEARLY IN THE INSTANT CASE, THERE IS NO SUCH LACK OF EVIDENCE AS TO CAST ANY DOUBT ON THE STATEMENT OF THE SUPREME COURT OF PENNSYLVANIA THAT "THESE FACTS....TAKEN IN CONSORT WITH

ALL REASONABLE INFERENCES, THEY CLEARLY JUSTIFY THE CONCLUSION THAT APPELLANT WAS LINKED TO THE CRIME BEYOND A REASONABLE DOUBT...."

II.

THE ADMISSION OF COLOR SLIDES OF THE TWO DEAD BODIES

RELATOR NEXT ALLEGES ERROR BY THE TRIAL COURT FOR ADMITTING INTO EVIDENCE COLOR SLIDES DEPICTING THE BODIES OF THE VICTIMS. LAW ON THIS SUBJECT IS WELL SETTLED THAT THE ADMISSION OF THIS TYPE OF EVIDENCE IS WITHIN THE DISCRETION OF THE TRIAL COURT AND ABSENT AN ABUSE OF THAT DISCRETION, THERE IS NO REVERSIBLE ERROR. COMMONWEALTH V. WOODS, 454 PA. 250, 252, 311 A.2D 582, 583 (1973); COMMONWEALTH V. DICKERSON, 406 PA. 102, 176 A.2D 421 (1962). MOREOVER, THE PROPER TEST TO BE APPLIED BY A TRIAL COURT IN DETERMINING THE ADMISSIBILITY OF PHOTOGRAPHS IN HOMICIDE CASES IS WHETHER OR NOT THE PHOTOGRAPHS ARE OF SUCH EVIDENTIARY VALUE THAT THEIR NEED CLEARLY OUTWEIGHS THEIR LIKELIHOOD OF INFLAMING THE MINDS AND PASSIONS OF THE JURORS. COMMONWEALTH V. POWELL, 428 PA. 275, 278 (1968). HOWEVER, SUCH PHOTOGRAPHS WILL NOT BE EXCLUDED MERELY BECAUSE THEY ARE UNPLEASANT OR GRUESOME. COMMONWEALTH V. SCARAMUZZINO, 455 PA. 378, 381 (1974). IN THE INSTANT CASE, THE COMMONWEALTH THEORY SUBSTANTIATED BY BALLISTIC EVIDENCE WAS THAT THE VICTIMS WERE KILLED BY SHOTS FROM TWO DIFFERENT WEAPONS AND THAT EACH PERSON WAS HIT BY SHOTS FROM BOTH GUNS. RECONSTRUCTING THE SHOOTINGS THROUGH THESE SLIDES THE PROSECUTION SOUGHT TO PROVE THAT NEITHER VICTIM COULD HAVE

SHOT THE OTHER, THAT GOREY WAS THE PRINCIPAL TARGET AND JANDA WAS SHOT WHILE SHE WAS ATTEMPTING TO HIDE BENEATH HER DESK TO AVOID THE EXISTENCE OF A WITNESS TO THE KILLING OF GOREY. THUS THE EVIDENCE WAS OFFERED TO AID THE JURY IN UNDERSTANDING THE PHYSICAL SCENE OF THE CRIME, THE NATURE AND EXTENT OF THE WOUNDS INFLICTED AND THE BRUTALITY OF THE MURDER TO GRAPHICALLY DEMONSTRATE THE EXISTENCE OF AN ATTEMPT TO TAKE LIFE.

MOREOVER, AS A GENERAL RULE, QUESTIONS INVOLVING THE ADMISSION OF EVIDENCE ARE NOT SUBJECT TO REVIEW BY A FEDERAL COURT IN A HABEAS CORPUS PROCEEDING INITIATED BY A STATE PRISONER UNLESS THERE IS AN ERROR OF SUCH MAGNITUDE AS TO DENY FUNDAMENTAL FAIRNESS TO THE CRIMINAL TRIAL. BURGETT V. TEXAS, 389 U.S. 109, 113-114 (1967); UNITED STATES EX REL. HARRIS V. ILLINOIS, 457 F.2D 191, 198 (7TH CIR. 1972); WILLIAMS V. WAINWRIGHT, 427 F.2D 921 (5TH CIR. 1970). WITHOUT INTENDING TO ENNUNCIATE (SIC) AN ALL INCLUSIVE RULE, I RECOMMEND THAT THE EVIDENCE OF THE COLOR SLIDES ADMITTED HERE DID NOT INFRINGE UPON THE FAIRNESS OF SULLIVAN'S TRIAL. SPENCER V. TEXAS, SUPRA. FURTHERMORE, IT IS WELL SETTLED THAT ERRORS COMMITTED DURING THE TRIAL OF A CRIMINAL CASE IN A STATE COURT ARE NOT SUBJECT TO REVIEW IN A HABEAS CORPUS PROCEEDING IN A FEDERAL COURT UNLESS "IT IS SHOWN THAT THE ERRORS WERE SO CONSPICUOUSLY PREJUDICIAL AS TO DEPRIVE THE DEFENDANT OF A FAIR TRIAL." UNITED STATES EX REL. CANNON V. MARONEY, 373 F.2D 908, 910 (3RD CIR. 1967).

III.

THE CALIBER OF LEGAL REPRESENTATION BY RELATOR'S COUNSEL

IN A CRIMINAL TRIAL THE ACCUSED IS ENTITLED TO THE ASSISTANCE OF COUNSEL IN HIS DEFENSE. UNITED STATES CONSTITUTION AMENDMENT VI. THIS PRINCIPLE IS APPLICABLE IN STATE, AS WELL AS FEDERAL PROCEEDINGS. GIDEON V. WAINWRIGHT, 372 U.S. 335 (1963). MOREOVER, THE QUALITY OF REPRESENTATION, WHICH IS REQUIRED IN ORDER TO MEET THE CONSTITUTIONAL STANDARDS MANDATED, MUST BE EFFECTIVE AND COMPETENT, AND NOT MERELY PREFUNCTORY OR CHARADE-LIKE IN CHARACTER. POWELL V. ALABAMA, 287 U.S. 485, 68, 71 (1932). WHILE THE SUPREME COURT HAS NOT ARTICULATED MORE PRECISE GUIDELINES WITH RESPECT TO THE QUALITY OF REPRESENTATION WHICH IS REQUIRED IN ORDER TO MEET DUE PROCESS AND FOURTEENTH AMENDMENT STANDARDS, VARIOUS COURTS OF APPEAL HAVE DONE SO. THE THIRD CIRCUIT, ALONG WITH THE FOURTH, FIFTH AND DISTRICT OF COLUMBIA CIRCUITS HAS TAKEN A STRICT VIEW OF THE MINIMAL STANDARD OF THE QUALITY OF REPRESENTATION WHICH MUST BE PROVIDED. THE REQUIREMENT IN THE THIRD CIRCUIT IS REASONABLE COMPETENCY. THIS PRECEPT WAS FIRST ENNUNCIATED (SIC) IN MOORE V. UNITED STATES, 432 F.2D 730, 737 (3RD CIR. 1970), OVERRULING UNITED STATES EX REL. CAREY V. RUNDLE, 409 F.2D 1210 (3RD CIR. 1969), CERT DENIED 397 U.S. 496 (1970), AND UNITED STATES EX REL. DARCY V. HANDY. 203 F.2D 407 (3RD CIR. 1953) "FARCE OR MOCKERY OF JUSTICE". SEE UNITED STATES EX REL. GREEN V. RUNDLE, 434 F.2D 1112 (3RD CIR. 1970). SEE ALSO UNITED STATES EX REL. NAVARRO V. JOHNSTON, 365 F. SUPP. 676 (E.D. PA. 1973). THE INQUIRY DOES NOT GO SIMPLY TO THE LEVEL OF

COMPETENCY, SINCE EVEN WHEN THERE IS NORMALLY COMPETENT REPRESENTATION THERE MAY BE ERRORS ON THE PART OF COUNSEL. RATHER, THE INQUIRY IS WHETHER THE ERRORS, IF ANY, WERE IN FACT, EGREGIOUS AND PREJUDICIAL. UNITED STATES EX REL. GREEN V. RUNDLE, SUPRA, AT 1113.[3] RELATOR HAS RAISED A NUMBER OF GROUNDS IN WHICH HE ALLEGES THAT HIS TRIAL COUNSEL WAS INEFFECTIVE AND INCOMPETENT. A SERIATIM REVIEW OF THE POINTS RAISED BY RELATOR FOLLOWS:

A. RELATOR CONTENDS INITIALLY THAT IT WAS ERROR FOR THE COURT TO EXPRESS ITS OPINION AS TO THE DEGREE OF GUILT INVOLVED IN THE CRIME. AS PREVIOUSLY NOTED, THE TEST FOR DETERMINING THE EFFECTIVENESS OF COUNSEL IS BASED UPON REASONABLE COMPETENCY.

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[3] "THE MOORE STANDARD IS COMPREHENSIVELY SET FORTH IN THE FOLLOWING PASSAGE FROM THE OPINION:

> A RETROSPECTIVE EXAMINATION OF A LAWYER'S REPRESENTATION TO DETERMINE WHETHER IT WAS FREE FROM ANY ERROR WOULD EXACT A HIGHER MEASURE OF COMPETENCY THAN THE PREVAILING STANDARD. PERFECTION IS HARDLY ATTAINABLE AND CERTAINLY IS NOT THE GENERAL RULE, ESPECIALLY IN PROFESSIONAL WORK WHERE INTUITIVE JUDGMENTS AND SPONTANEOUS DECISIONS ARE OFTEN REQUIRED IN VARYING CIRCUMSTANCES. THE ARTISTRY OF THE ADVOCATE IS DIFFICULT TO JUDGE RETROSPECTIVELY BECAUSE THE ELEMENTS INFLUENCING JUDGMENT USUALLY CANNOT BE CAPTURED ON THE RECORD. THE KALEIDOSCOPIC RANGE OF POSSIBILITIES OFTEN SEEMS LIMITLESS, AND IT IS PROVERBIAL THAT THE FINEST IDEAS EMERGE ON THE WAY BACK FROM THE COURTHOUSE. THE ADVOCATE'S WORK, THEREFORE, IS NOT READILY CAPABLE OF LATER AUDIT LIKE A BOOKKEEPER'S. OF COURSE, NOT ALL THE ACTIVITY OF THE ADVOCATE HAS THIS HIGHLY SUBJECTIVE QUALITY. IT IS POSSIBLE TO EXAMINE THE SUFFICIENCY OF HIS PREPARATION AND THE ADEQUACY OF HIS KNOWLEDGE OF THE RELEVANT LAW. REVIEW MAY DISCLOSE FAILURES AT THE TRIAL. ALL THESE ARE MATTERS WHICH WILL INFORM THE JUDGMENT ON A RETROSPECTIVE INQUIRY WHETHER COUNSEL ADEQUATELY PERFORMED HIS DUTY. BUT SINCE WHAT IS REQUIRED IS NORMAL AND NOT EXCEPTIONAL REPRESENTATION, THERE IS ROOM FOR THE REALIZATION THAT IT WOULD BE DIFFICULT TO FIND A CASE WHERE EVEN THE ABLEST AND MOST EXPERIENCED TRIAL LAWYER WOULD BE COMPLETELY SATISFIED AFTER A SEARCHING RE-EXAMINATION OF HIS CONDUCT OF A CASE."

MOORE V. UNITED STATES, 432 F.2D 730, 736-37 (3D CIR. 1970). (EMPHASIS ADDED.)

MOORE V. UNITED STATES, SUPRA. AT THE TIME OF RELATOR'S TRIAL, THE LAW PERMITTED THE TRIAL JUDGE TO EXPRESS HIS OPINION IN THE CASE.[4]

> "...IT IS ALWAYS THE PRIVILEGE AND SOMETIMES THE DUTY OF A TRIAL JUDGE TO EXPRESS HIS OWN OPINION, INCLUDING HIS OPINION OF THE WEIGHT AND THE EFFECT OF THE EVIDENCE OR ITS POINTS OF STRESS AND WEAKNESS OR EVEN THE GUILT OR INNOCENCE OF THE DEFENDANT AND THE VERDICT WHICH IN HIS JUDGMENT, THE JURY SHOULD RENDER." COMMONWEALTH V. OTT, 417 PA. 269, 272 (1965) QUOTING COMMONWEALTH V. CHAMBERS, 367 PA. 159, 164 (1951). (EMPHASIS ADDED.)

MOREOVER, THIS OPINION OR COMMENT IS REQUIRED TO BE FAIRLY OR TEMPERATELY STATED, CLEARLY LEAVING THE JURY FREE TO REACH AN INDEPENDENT CONCLUSION.

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[4] IN SUPPORT OF HIS POSITION RELATOR RELIES UPON THE SUPREME COURT OF PENNSYLVANIA'S DECISION IN COMMONWEALTH V. ARCHANBALT, 448 PA. 90, 290 A.2D 72 (1972) AND COMMONWEALTH V. GOINS, 457 PA. 594, 321 A.2D 913 (1974), BOTH OF WHICH WERE DECIDED SEVERAL YEARS AFTER RELATOR'S TRIAL. HOWEVER, EVEN ASSUMING ARGUENDO THESE DECISIONS APPLY RETROACTIVELY AND THAT COUNSEL SHOULD HAVE POSSESSED THE FORESIGHT TO ANTICIPATE THEM, I BELIEVE THIS RELIANCE IS MISPLACED. IN ARCHANBALT, SUPRA, THE COURT ANNOUNCED A NEW RULE THAT THE TRIAL JUDGE COULD NO LONGER EXPRESS AN OPINION AS TO THE GUILT OR INNOCENCE OF AN ACCUSED. THERE IS NO EVIDENCE THAT THE TRIAL JUDGE EXPRESSED SUCH AN OPINION IN THIS CASE WITH RESPECT TO RELATOR AND THUS THAT CASE IS INAPPLICABLE. IN GOINS, SUPRA, THE ACCUSED HAD ADMITTED COMMITTING THE HOMICIDE BUT ASSERTED THE DEFENSES OF INTOXICATION AND INSANITY IN AN EFFORT TO LESSEN THE DEGREE OF GUILT. FOUR MEMBERS OF THE SUPREME COURT OF PENNSYLVANIA EXPRESSED THE VIEW THAT IT WAS INAPPROPRIATE FOR THE COURT TO COMMENT UPON THE DEGREE OF GUILT WHERE THAT WAS THE ONLY ISSUE FOR THE JURY TO DECIDE. RELATOR HOWEVER CONCEDED AT THE TRIAL THAT THE CRIME AMOUNTED TO FIRST DEGREE MURDER BUT BASED HIS DEFENSE UPON THE THEORY THAT THE EVIDENCE WAS INSUFFICIENT TO ESTABLISH HIS GUILT. THUS, THE PRINCIPLE ANNOUNCED IN GOINS, SUPRA, IS LIKEWISE INAPPLICABLE HERE.

I BELIEVE THIS TEST WAS SATISFIED. AFTER HIS COMMENTS, THE COURT REPEATEDLY REMINDED THE JURORS THAT HE WAS MERELY STATING HIS OPINION, THE REMARKS WERE NOT BINDING UPON THEM AND THAT THE ULTIMATE DETERMINATION OF THE FACTS AND THE VERDICT WAS SOLELY THAT OF THE PANEL.

ADDITIONALLY, THE CASE SUB JUDICE COMES TO THIS COURT ON COLLATERAL ATTACK FROM A STATE CONVICTION. IN THAT CIRCUMSTANCE, A DIFFERENT STANDARD OF REVIEW APPLIES.

AS THE SUPREME COURT OBSERVED IN SPLAWN V. CALIFORNIA, ___ U.S. ___, 45 USLW 4574, 4575 (US JUNE 1977), WHERE THE PROSECUTIONS OCCUR IN FEDERAL COURTS:

> "(O)UR AUTHORITY TO REVIEW JURY INSTRUCTIONS IS A GOOD DEAL BROADER THAN IS OUR POWER TO UPSET STATE COURT CONVICTIONS BY REASON OF INSTRUCTIONS GIVEN DURING THE COURSE OF A TRIAL. SEE CUPP V. NAUGHTEN, 414 U.S. 141 (1973); HENDERSON V. KIBBE, ___ U.S. ___. WE CAN EXERCISE THE LATTER AUTHORITY ONLY IF THE INSTRUCTION RENDERS THE SUBSEQUENT CONVICTION VIOLATIVE OF THE UNITED STATES CONSTITUTION." (EMPHASIS ADDED.)

IN HENDERSON V. KIBBE, ___ U.S. ___, 45 USLW 4457 (US MAY 16, 1977), ALSO A HABEAS CORPUS CASE, THE COURT OF APPEALS RELIED ON IN RE WINSHIP, 397 U.S. 358 (1970) IN REVERSING THE DENIAL OF A WRIT. THE APPELLATE COURT HAD CONCLUDED THAT FAILURE OF THE STATE TRIAL COURT TO CHARGE ON CAUSATION IN A COMPLEX HOMICIDE CASE HAD RESULTED IN "AN IMPERMISSIBLE RISK THAT THE JURY HAD NOT MADE A FINDING THAT THE CONSTITUTION REQUIRES." 45 USLW AT 4459. IN REVERSING, THE SUPREME COURT STATED:

> "THE BURDEN OF DEMONSTRATING AN ERRONEOUS INSTRUCTION WAS SO PREJUDICIAL THAT IT WILL SUPPORT A COLLATERAL ATTACK ON THE CONSTITUTIONAL VALIDITY OF A STATE COURT'S JUDGMENT IS EVEN GREATER THAN THE SHOWING REQUIRED TO ESTABLISH PLAIN ERROR ON DIRECT APPEAL." 45 USLW AT 4460.

IT IS MY JUDGMENT THAT RELATOR HAS NOT MET HIS BURDEN OF DEMONSTRATING THAT THE INSTRUCTION OF THE COURT WAS SO PREJUDICIAL AS TO BE VIOLATIVE OF THE UNITED STATES CONSTITUTION.

B. RELATOR'S NEXT CONTENTION IS THAT TRIAL COUNSEL WAS INEFFECTIVE FOR FAILING TO OBJECT TO THE INTRODUCTION OF EVIDENCE THAT RELATOR HAD EXERCISED IN HIS RIGHT TO REMAIN SILENT UNTIL HE HAD OBTAINED COUNSEL. SGT. HUESTON TESTIFIED FOR THE COMMONWEALTH AT THE TRIAL OF RELATOR ON JUNE 22, 1966. ON DIRECT EXAMINATION HE WAS ASKED THE FOLLOWING QUESTIONS AND GAVE THE FOLLOWING ANSWERS:

> "Q. (BY MR. SPRAGUE) YOU THEN ASKED THE DEFENDANT DID HE KNOW JOHN GOREY, AND WHAT WAS STATED?
>
> "A. (BY DETECTIVE HUESTON) HE SAID HE AND JOHN GOREY WERE BUSINESS ASSOCIATES, BUT HE WASN'T IN THE BUILDING WHEN GOREY WAS KILLED.
>
> "WE THEN ASKED HIM WHERE HE WAS. HE SAID THAT HE WOULD ANSWER NO FURTHER QUESTIONS UNTIL HE CALLED AN ATTORNEY.
>
> "Q. DID YOU THEN CONTACT AN ATTORNEY?
>
> "A. HE THEN CALLED AN ATTORNEY." (N.T. TRIAL, 469 TO 470).

IN DEALING WITH THIS PARTICULAR ISSUE THE SUPREME COURT OF PENNSYLVANIA REFUSED TO REACH THE MERITS OF THIS CLAIM. THE COURT STATED:

> "ALTHOUGH THIS GROUND FOR RELIEF WAS ALLEGED IN THE AMENDED P.C.H.A. PETITION, IT WAS NOT PURSUED AT THE TIME OF THE HEARING NOR WAS IT DISCUSSED IN THE BRIEF TO THE HEARING COURT. ACCORDINGLY, WE WILL NOT CONSIDER THE QUESTION ON APPEAL...."

IT IS THUS INCUMBENT UPON THIS COURT TO DETERMINE WHETHER OR NOT ON THIS PARTICULAR GROUND RELATOR HAS EXHAUSTED HIS STATE REMEDIES.

THE SUPREME COURT'S DECISION IN PICARD V. CONNOR, 404 U.S. 270 (1971) PROVIDES THE INITIAL STEP IN MY ANALYSIS. CONNOR CONTENDED TO THE STATE COURT THAT HIS STATE-COURT CONVICTION WAS INVALID BECAUSE THE PROSECUTION HAD NOT BEEN INSTITUTED AS A RESULT OF AN INDICTMENT RETURNED BY A GRAND JURY. HE CLAIMED THAT THE GRAND JURY CLAUSE OF THE FIFTH AMENDMENT HAD BEEN INCORPORATED WITHIN THE DUE PROCESS CLAUSE OF THE FOURTEENTH AMENDMENT, THUS MAKING IT APPLICABLE TO THE STATE. THIS ARGUMENT WAS REJECTED BY THE STATE COURTS AND CONNOR PETITIONED FOR A FEDERAL HABEAS RELIEF. A SEPARATE EQUAL PROTECTION CLAIM WAS SUGGESTED FOR THE FIRST TIME IN THE FEDERAL COURT. THE SUPREME COURT REVERSED THE COURT OF APPEALS, RULING THAT A FEDERAL HABEAS CORPUS COURT MAY NOT ENTERTAIN AN ISSUE PRESENTED TO IT UNLESS THE "SAME CLAIM" HAD BEEN URGED UPON THE STATE COURTS. IN ORDER TO MEET THIS STANDARD, THE SUPREME COURT STATED THAT THE ARGUMENT BROUGHT BEFORE THE FEDERAL COURT MUST BE "THE SUBSTANTIAL EQUIVALENT" OF A CLAIM ALREADY PRESENTED TO THE STATE COURTS; "THE SUBSTANCE OF" THE CLAIM RAISED IN THE

FEDERAL COURT MUST HAVE FIRST BEEN SUBMITTED TO THE STATE COURT. ID. AT 277, 278. FOLLOWING THESE GUIDELINES, THE SUPREME COURT HELD THAT STATE-COURT REMEDIES HAD NOT BEEN EXHAUSTED BY CONNOR WITH REGARD TO THE EQUAL PROTECTION CONTENTION.

LATER DECISIONS OF THE SUPREME COURT ARE HELPFUL IN CLARIFYING THE SCOPE OF THE WORD "CLAIM" IN DETERMINING WHETHER A CONTENTION HAS FIRST BEEN TENDERED TO THE STATE COURTS FOR PURPOSES OF EXHAUSTION. THE COURT HAS OBSERVED THAT THE "METHOD OF ANALYSIS" ASSERTED IN THE FEDERAL COURT MUST HAVE BEEN "READILY AVAILABLE TO THE STATE COURT". STANLEY V. ILLINOIS, 405 U.S. 645, 658 N. 10 (1972) (DICTUM). IT HAS BEEN HELD THAT THE PETITIONER MUST GIVE THE STATE SYSTEM THE OPPORTUNITY TO RESOLVE THE FEDERAL CONSTITUTION "ISSUES" BEFORE HE GOES TO THE FEDERAL COURT FOR HABEAS RELIEF.[5] IN FRANCISCO, THE SUPREME COURT HELD THAT THE "ISSUES" RAISED BY THE PETITIONER IN A FEDERAL HABEAS COURT HAD BEEN EXHAUSTED IN THE STATE COURTS. THE INTERVENTION OF A DECISION BY THE STATE SUPREME COURT THAT ARGUABLY WOULD HAVE AFFORDED THE PETITIONER RELIEF IN THE STATE COURTS WAS HELD NOT TO PRECLUDE FEDERAL HABEAS REVIEW. SEE ALSO PITCHESS V. DAVIS, 421 U.S. 482, 487 (1975) (PER CURIAM). WITHIN THE CONTOURS OF A PARTICULAR ARGUMENT, HOWEVER, NOT EVERY DETAIL NEED HAVE TO BE PUT BEFORE THE STATE COURT IN ORDER TO PRESENT ALL FACETS OF THE ARGUMENT TO THE FEDERAL COURT ON A PETITION FOR HABEAS. SMITH V. GOGUEN, 415 U.S. 566, 576-77 (1974) (DICTUM).

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[5] FRANCISCO V. GATHRIGHT, 419 U.S. 59, 63 (1974) (PER CURIAM).

Accord United States ex rel. Johnson v. Johnson, 531 F.2d 169, 173 (3rd Cir. 1976).

In the case before this Court it is clear that this ground was raised in the P.C.H.A. petition. Likewise the ground was raised in relator's brief submitted by counsel to the State Supreme Court under Argument Number 9 when it was stated "Appellant was denied effective assistance of counsel by reason of failure to object to the introduction of evidence in violation of your Appellant's constitutional right to silence and to counsel." Again in the "statement of questions presented" appellant's brief before the Supreme Court of Pennsylvania reads as follows:

> "IX. WAS APPELLANT DENIED EFFECTIVE ASSISTANCE OF COUNSEL BY REASON OF FAILURE TO OBJECT TO THE INTRODUCTION OF EVIDENCE IN VIOLATION OF YOUR APPELLANT'S CONSTITUTIONAL RIGHT TO SILENCE AND TO COUNSEL (not answered by the Post-Conviction Court)."

The argument presented before this Court on federal habeas corpus is clearly the same. Here relator argues that he was denied effective assistance of counsel where counsel failed to object to testimonial reference by a police detective (to) your petitioner's right to remain silent and his right to refuse to answer questions without the assistance of counsel.

It is thus very clear that relator did give the state system the opportunity to resolve the federal constitutional issue and that not every detail need have been put before the state court in order to present all facets of the argument to

the federal court on the petition for habeas as here. I therefore will consider this argument on its merits.

At relator's trial, a police officer testified without objection that after relator stated that he was not in the Union Hall at the time of the homicides, relator advised the officer that he would answer no further questions until he had contacted an attorney. (N.T. Trial 469-470 supra).

It is the relator's contention that counsel in failing to object to the questions and answers given by Sgt. Hueston constituted an attorney's ignorance of relevant case law and therby rendered his assistance ineffective.

It is of course settled that references to an accused's exercise of his constitutional rights pursuant to Miranda v. Arizona, 384 U.S. 436 (1966) are an impermissible subject for prosecutorial comment or testimony. Griffin v. California, 380 U.S. 609 (1965); Baker v. United States, 357 F.2d 11 (1966); United States v. Kroslack, 426 F.2d 1129 (7th Cir. 1970). This relator had a constitutional right to refuse to make a statement until his request that a lawyer be present was met. Miranda v. Arizona, supra. Therefore, I would find little difference between the prejudice resulting from the testimony admitted in the case before us, and a prosecutor's comment before a jury on a defendant's exercise of his constitutional right not to take the witness stand. Such comments have been held to be reversible error. Griffin v. California, supra. The testimony elicited here could well have led the jury to infer guilt from relator's refusal

TO MAKE A STATEMENT. I THINK THE EXERCISE OF A CONSTITUTIONAL PRIVILEGE SHOULD NOT INCUR THIS PENALTY. THE FIFTH CIRCUIT HAS STATED: "WE WOULD BE NAIVE IF WE FAILED TO RECOGNIZE THAT MOST LAYMEN VIEW AN ASSERTION OF THE FIFTH AMENDMENT PRIVILEGE AS A BADGE OF GUILT." WALKER V. UNITED STATES, 404 F.2D 900 (1968).

THE COMMONWEALTH ARGUES THAT THERE WAS NO TESTIMONY OR COMMENT CONCERNING THE IMPLICATIONS OF THE REQUEST. THEY FURTHER STATE THAT THE TESTIMONY WAS AN ISOLATED EPISODE IN A LENGTHY TRIAL AND THAT AN OBJECTION MAY HAVE ONLY HIGHLIGHTED RELATOR'S REQUEST FOR AN ATTORNEY. HERE, HOWEVER, AS DISTINGUISHED FROM UNITED STATES V. BECERA-SOTO, 387 F.2D 792 (7TH CIR. 1967), CERT DENIED 391 U.S. 928, NO CAUTIONARY INSTRUCTION WAS GIVEN WHEN SGT. HUESTON DISCUSSED RELATOR'S SILENCE. AND, THE VIOLATION OF RELATOR'S CONSTITUTIONAL RIGHTS IS OF GREATER SIGNIFICANCE IN VIEW OF THE THINNESS OF THE EVIDENCE AGAINST HIM IN THIS RECORD. SEE CHAPMAN V. CALIFORNIA, 386 U.S. 18.

THUS, WE COME TO THE QUESTION OF WHETHER OR NOT THE FAILURE TO OBJECT CONSTITUTED INEFFECTIVE ASSISTANCE OF COUNSEL IN THIS INSTANCE. IN DETERMINING THIS ISSUE WE ARE FACED IMMEDIATELY WITH THE RECENT DECISION OF THE SUPREME COURT OF THE UNITED STATES IN WAINWRIGHT, SECRETARY, DEPARTMENT OF OFFENDER REHABILITATION OF FLORIDA V. SYKES, ___ U.S. ___, DECIDED JUNE 23, 1977, NUMBER 75-1578. THIS DECISION HELD THAT THE DEFENDANT'S FAILURE TO MAKE A TIMELY OBJECTION UNDER THE FLORIDA CONTEMPORANEOUS OBJECTION RULE TO THE ADMISSION OF INCULPATORY STATEMENTS, ABSENT

A SHOWING OF CAUSE FOR THE NONCOMPLIANCE AND SOME SHOWING OF ACTUAL PREJUDICE, BARRED FEDERAL HABEAS CORPUS REVIEW OF HIS MIRANDA CLAIM. THE DECISION IS CRITICAL BECAUSE OF THE OVERRULING OF THE LEADING CASE OF FAY V. NOIA, 372 U.S. 391 (1963). WAINWRIGHT HELD THAT THE SWEEPING LANGUAGE SET FORTH IN FAY V. NOIA, WHICH WOULD RENDER A STATE'S TIMELY-OBJECTION RULE INEFFECTIVE TO BAR REVIEW OF UNDERLYING FEDERAL CLAIMS IN FEDERAL HABEAS CORPUS PROCEEDINGS-ABSENT A "KNOWING WAIVER" OR A "DELIBERATE BYPASS" OF THE RIGHT TO SO OBJECT, WAS REJECTED AS ACCORDING TOO LITTLE RESPECT TO THE STATE TIMELY OBJECTION RULE. CONVERSELY, THE RULE OF FAY V. NOIA, MAY ENCOURAGE DEFENSE LAWYERS TO TAKE THEIR CHANCES ON A VERDICT OF NOT GUILTY IN A STATE TRIAL COURT, INTENDING TO RAISE THEIR CONSTITUTIONAL CLAIMS IN A FEDERAL HABEAS CORPUS COURT IF THEIR INITIAL GAMBLE FAILS, AND DETRACTS FROM THE PERCEPTION OF THE TRIAL OF A CRIMINAL CASE AS A DECISIVE AND PORTENTOUS EVENT. THE COURT STATED AT PAGE 17:

> "....UNDER THE RULE OF FAY V. NOIA, SUPRA, STATE APPELLATE COURTS KNOW THAT A FEDERAL CONSTITUTIONAL ISSUE RAISED FOR THE FIRST TIME IN THE PROCEEDING BEFORE THEM MAY WELL BE DECIDED IN ANY EVENT BY A FEDERAL HABEAS TRIBUNAL. THUS THEIR CHOICE IS BETWEEN ADDRESSING THE ISSUE NOTWITHSTANDING THE PETITIONER'S FAILURE TO TIMELY OBJECT, OR ELSE FACE THE PROSPECT THAT THE FEDERAL HABEAS COURT WILL DECIDE THE QUESTION WITHOUT THE BENEFIT OF THEIR VIEWS.
>
> THE FAILURE OF THE FEDERAL HABEAS COURTS GENERALLY TO REQUIRE COMPLIANCE WITH A CONTEMPORANEOUS OBJECTION RULE TENDS TO DETRACT FROM THE PERCEPTION OF THE TRIAL OF A CRIMINAL CASE IN STATE COURT AS A DECISIVE AND PORTENTOUS EVENT. A DEFENDANT HAS BEEN ACCUSED OF A SERIOUS

> CRIME, AND THIS IS THE TIME AND PLACE SET FOR HIM TO BE TRIED BY A JURY OF HIS PEERS AND FOUND EITHER GUILTY OR NOT GUILTY BY THAT JURY. TO THE GREATEST EXTENT POSSIBLE ALL ISSUES WHICH BEAR ON THIS CHARGE SHOULD BE DETERMINED IN THIS PROCEEDING: THE ACCUSED IS IN THE COURTROOM, THE JURY IS IN THE BOX, THE JUDGE IS ON THE BENCH, AND THE WITNESSES, HAVING BEEN SUBPOENAED AND DULY SWORN, AWAIT THEIR TURNS TO TESTIFY. SOCIETY'S RESOURCES HAVE BEEN CONCENTRATED AT THAT TIME AND PLACE IN ORDER TO DECIDE, WITHIN THE LIMITS OF HUMAN FALLIBILITY, THE QUESTION OF GUILT OR INNOCENCE OF ONE OF ITS CITIZENS. ANY PROCEDURAL RULE WHICH ENCOURAGES THE RESULT THAT THOSE PROCEEDINGS BE AS FREE OF ERROR AS POSSIBLE IS THOROUGHLY DESIRABLE, AND THE CONTEMPORANEOUS OBJECTION RULE SURELY FALLS WITHIN THIS CLASSIFICATION."

AS IN WAINWRIGHT, RELATOR HAS ADVANCED NO EXPLANATION WHATEVER FOR HIS COUNSEL'S FAILURE TO OBJECT AT TRIAL TO THE TESTIMONY BROUGHT OUT BY THE PROSECUTOR.

THE TOUCHSTONE OF FAY V. NOIA, IS THE EXERCISE OF VOLITION BY THE DEFENDANT HIMSELF WITH RESPECT TO HIS OWN FEDERAL CONSTITUTIONAL RIGHTS. IN CONTRAST, THE CLAIM IN THE CASE BEFORE US RELATES TO EVENTS DURING THE TRIAL ITSELF. TYPICALLY, HABEAS PETITIONERS CLAIM THAT UNLAWFULLY SECURED EVIDENCE WAS ADMITTED AND THAT IMPROPER TESTIMONY WAS ADDUCED OR THAT AN IMPROPER JURY CHARGE WAS GIVEN. BUT UNLIKE FAY, PRESERVATION OF THIS TYPE OF CLAIM UNDER STATE PROCEDURAL RULES DOES NOT GENERALLY INVOLVE AN ASSERTION BY THE DEFENDANT HIMSELF; RATHER THE DECISION TO ASSERT OR NOT TO ASSERT CONSTITUTIONAL RIGHTS OR CONSTITUTIONALLY BASED OBJECTIONS AT TRIAL IS NECESSARILY ENTRUSTED TO THE DEFENDANT'S ATTORNEY, WHO MUST MAKE ON-THE-SPOT DECISIONS AT

VIRTUALLY ALL STAGES OF A CRIMINAL TRIAL. AS A PRACTICAL MATTER, A CRIMINAL DEFENDANT IS RARELY, IF EVER, IN A POSITION TO DECIDE, FOR EXAMPLE WHETHER CERTAIN TESTIMONY IS HEARSAY AND, IF SO, WHETHER IT IMPLICATES INTERESTS PROTECTED BY THE CONFRONTATION CLAUSE; INDEED IT IS BECAUSE "EVEN THE INTELLIGENT AND EDUCATED LAYMAN HAS SMALL AND SOMETIMES NO SKILL IN THE SCIENCE OF LAW" THAT THE SUPREME COURT HELD THAT CONSTITUTIONALLY (SIC) REQUIRED THAT EVERY DEFENDANT WHO FACES THE POSSIBILITY OF INCARCERATION BE AFFORDED COUNSEL. ARGERSINGER V. HAMLIN, 407 U.S. 25 (1972).

ONCE COUNSEL IS APPOINTED, THE DAY-TO-DAY CONDUCT OF THE DEFENSE RESTS WITH THE ATTORNEY. HE, NOT THE CLIENT, HAS THE IMMEDIATE-AND ULTIMATE-RESPONSIBILITY OF DECIDING IF AND WHEN TO OBJECT, WHICH WITNESSES, IF ANY, TO CALL, AND WHAT DEFENSES TO DEVELOP. NOT ONLY DO THESE DECISIONS REST WITH THE ATTORNEY, BUT SUCH DECISIONS MUST, AS A PRACTICAL MATTER, BE MADE WITHOUT CONSULTING THE CLIENT.[6]

THE TRIAL PROCESS DOES NOT PERMIT THE TYPE OF FREQUENT AND PROTRACTED INTERRUPTIONS WHICH WOULD BE NECESSARY IF IT WERE REQUIRED THAT CLIENTS GIVE KNOWING AND INTELLIGENT APPROVAL TO EACH OF THE MYRIAD TACTICAL DECISIONS AS THE TRIAL PROCEEDS.

SINCE TRIAL DECISIONS ARE OF NECESSITY ENTRUSTED TO THE ACCUSED'S ATTORNEY, THE FAY STANDARD OF "KNOWING AND INTELLIGENT WAIVER" IS SIMPLY INAPPLICABLE. MOREOVER, WHILE THE TESTIMONY

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[6] ONLY SUCH BASIC DECISIONS AS TO WHETHER TO PLEAD GUILTY, WAIVE A JURY, OR TESTIFY ON ONE'S OWN BEHALF ARE ULTIMATELY FOR THE ACCUSED TO MAKE. SEE ABA REPORT ON STANDARDS RELATING TO THE PROSECUTION FUNCTION AND DEFENSE FUNCTION §5.2 AT 237-238.

IN QUESTION IS NOW CLEARLY IMPROPER UNDER THE PENNSYLVANIA CASE OF COMMONWEALTH V. HAIDEMAN, 449 PA. 367 (1972), HAIDEMAN WAS NOT DECIDED UNTIL SOME FIVE YEARS AFTER RELATOR'S TRIAL AND WAS THE FIRST PENNSYLVANIA DECISION TO HOLD THIS TYPE OF TESTIMONY INADMISSIBLE.

I RECOMMEND TO THIS COURT THAT ON THIS ISSUE A FINDING BE MADE THAT COUNSEL WAS NOT INEFFECTIVE FOR FAILING TO OBJECT TO THE TESTIMONY REFERRING TO RELATOR'S EXERCISE OF HIS CONSTITUTIONAL RIGHTS.

IV.

THE CLAIM OF INEFFECTIVE ASSISTANCE OF COUNSEL IN FAILING TO PRESERVE OBJECTION TO THE OFFERING OF A SECRET MEMORANDUM TO THE TRIAL JUDGE.

ON THE DATE JURY SELECTION WAS SCHEDULED TO COMMENCE IN THE TRIAL OF THE RELATOR, THE ASSISTANT DISTRICT ATTORNEY REQUESTED A CONTINUANCE OF THE CASE AND INDICATED FOR THE RECORD THAT HE DECLINED TO DISCLOSE THE REASON. (N.T. TRIAL MAY 17, 1967, P. 35, 48). OVER THE DEFENSE OBJECTION, THE REASON FOR THE REQUEST FOR CONTINUANCE WAS PLACED IN A SEALED ENVELOPE AND DELIVERED TO THE TRIAL JUDGE. THE TRIAL NOTES OF TESTIMONY REFLECT THE FACT THAT THE CONTENTS OF THAT ENVELOPE WERE NEVER DISCLOSED TO DEFENSE COUNSEL, AND TRIAL COUNSEL, JUDGE DIBONA, TESTIFIED AT THE POST-CONVICTION PROCEEDINGS THAT HE NEVER LEARNED THE CONTENTS OF THAT ENVELOPE. (N.T. POST-CONVICTION P. 70). HE STATED FURTHER THAT HE HAD NO IDEA WHETHER THE COMMUNICATION BETWEEN THE ASSISTANT

DISTRICT ATTORNEY AND THE TRIAL JUDGE HAD ANYTHING TO DO WITH TRIAL EVIDENCE IN THE CASE, AND HE CHARACTERIZED THE SITUATION IN WHICH HE FOUND HIMSELF AS "OPPOSED TO EVERY CONCEPT OF JUSTICE, EVERY CONCEPT OF ETHICS, EVERY CONCEPT OF PROPRIETY FOR A PARTY AND LITIGANT TO HAVE A COMMUNICATION WITH THE JUDGE TO THE EXCLUSION OF THE OTHER SIDE, AND HAVE AN IRONCLAD RULE THAT THE OTHER SIDE MAY NOT KNOW ABOUT." (N.T. POST-CONVICTION P. 47). IT IS CONTENDED THAT NEITHER JUDGE DIBONA NOR MR. PERUTO EVER RAISED THIS ISSUE IN POST-TRIAL MOTIONS AND THAT NO BRIEF WAS EVER FILED ON RELATOR'S BEHALF ON APPEAL. THE TRIAL JUDGE HIMSELF TESTIFIED IN POST-CONVICTION PROCEEDINGS AT THE REQUEST OF THE ASSISTANT DISTRICT ATTORNEY RELATING TO THE COMMONWEALTH'S HAVING COME INTO RECENT POSSESSION OF WEAPONS WHICH IT WISHED TO HAVE TESTED PRIOR TO COMMENCEMENT OF TRIAL. (N.T. 12-14; 53-56). RELATOR ARGUES THAT WHATEVER MAY HAVE BEEN THE SUBSTANCE OF THE COMMONWEALTH'S EVIDENCE, WHETHER FAVORABLE OR UNFAVORABLE TO THE DEFENSE, THE CONDUCT OF THE ASSISTANT DISTRICT ATTORNEY IN THE TRIAL COURT WITH RESPECT TO THE RECEPTION OF A PRIVATE COMMUNICATION, MANY YEARS LATER FOUND TO HAVE RELATED TO WEAPONS SHOULD HAVE BEEN DISCLOSED TO THE RELATOR'S COUNSEL AND THE POSITION WITH RESPECT TO THIS MOTION SHOULD HAVE BEEN PRESERVED FOR POST-TRIAL MOTIONS AND SHOULD HAVE BEEN APPEALED. RELATOR FURTHER ARGUES THAT THE CONSEQUENCE OF THE CONDUCT WAS LEFT WITH THE SPECULATION THAT THE BALLISTICS EXPERT IN FACT HAD SOME WEAPONS, EXAMINED SOME, AND PREPARED REPORTS WITH RESPECT TO THEM, WHEREAS THE DEFENSE HAD

NO OPPORTUNITY TO AVAIL ITSELF EITHER OF NEGATIVE OR POSITION (SIC) INFERENCES THEREFROM. NOW RELATOR RELIES ON BRADY V. MARYLAND, 373 U.S. 83, AND ARGUES THAT THE SUPPRESSION OF THIS MATERIAL VIOLATED HIS DUE PROCESS RIGHTS.

AT TRIAL, THE BALLISTICS EXPERT TESTIFIED THAT HE HAD TEST FIRED CERTAIN GUNS DURING HIS INVESTIGATION AND FOUND THAT THESE WEAPONS WERE NOT USED TO COMMIT THE CRIMES HEREIN INVOLVED. THUS, NOT ONLY WAS THE OBJECTION NOT ADDRESSED TO THE PROPRIETY OF THE TRIAL COURT'S RULING PERMITTING THE WITNESS TO EXAMINE THE WEAPONS, BUT THE ACTUAL RESULTS WERE NOT HARMFUL TO THE DEFENSE.

THE THRUST OF THE OBJECTION WAS DIRECTED TO A PRIVATE COMMUNICATION BETWEEN THE COURT AND PROSECUTION IN WHICH THE DEFENSE WAS EXCLUDED. WHILE THE SUPREME COURT OF PENNSYLVANIA FOUND THAT SUCH A PRACTICE SHOULD NOT BE CONDONED, IT DID NOT FIND THAT ANY PREJUDICE TO RELATOR RESULTED IN THIS CASE. THE COURT THUS FOUND THAT IF COUNSEL HAD PRESSED THIS OBJECTION ON APPEAL IT WOULD NOT HAVE JUSTIFIED THE AWARD OF A NEW TRIAL. THUS, COUNSEL COULD NOT BE FOUND TO BE INEFFECTIVE FOR FAILING TO PRESERVE AN OBJECTION WHICH HAD NO PROBABILITY TO SUCCESS (SIC). MOREOVER, THE CONTENTION THAT THE FAILURE OF THE COMMONWEALTH TO MAKE AVAILABLE TO THE DEFENSE THESE REPORTS IN any WAY VIOLATED RELATOR'S DUE PROCESS RIGHTS UNDER BRADY V. MARYLAND, SUPRA, IS UNWARRANTED. BRADY, SUPRA, REQUIRES THE

PROSECUTION TO FURNISH THE DEFENSE EVIDENCE ON DEMAND WHICH WOULD TEND TO EXCULPATE HIM OR REDUCE THE DEGREE OF PENALTY. AS INDICATED ABOVE, THE INFORMATION WAS INTRODUCED DURING THE TRIAL AND THE DEFENSE HAD THE OPPORTUNITY OF USING IT IN ANY MANNER IT DEEMED APPROPRIATE.

IN UNITED STATES V. AGURS, 427 U.S. 97 (1976) THE SUPREME COURT CONSIDERED WHETHER THE PROSECUTOR HAD ANY CONSTITUTIONAL DUTY TO VOLUNTEER EXCULPATORY MATTER TO THE DEFENSE, AND IF SO, WHAT STANDARD OF MATERIALITY GAVE RISE TO THAT DUTY. THE COURT HELD THAT THE PROSECUTOR WILL NOT HAVE VIOLATED HIS CONSTITUTIONAL DUTY OF DISCLOSURE UNLESS HIS ADMISSION IS OF SUFFICIENT SIGNIFICANCE TO RESULT IN THE DENIAL OF THE DEFENDANT'S RIGHT TO A FAIR TRIAL. THE COURT NOTED AT PAGE 109:

> "....THERE IS NO CONSTITUTIONAL REQUIREMENT THAT THE PROSECUTION MAKE A COMPLETE AND DETAILED ACCOUNTING TO THE DEFENSE OF ALL POLICE INVESTIGATORY WORK ON THE CASE." MOORE V. ILLINOIS, 408 U.S. 786, 795. (EMPHASIS ADDED.)

THE MERE POSSIBILITY THAT AN ITEM OF UNDISCLOSED INFORMATION MIGHT HAVE HELPED THE DEFENSE, OR MIGHT HAVE AFFECTED THE OUTCOME OF THE TRIAL, DOES NOT ESTABLISH "MATERIALITY" IN THE CONSTITUTIONAL SENSE.

THE CONSTITUTIONAL OBLIGATION IS MEASURED NOT BY THE MORAL CULPABILITY OR THE WILFULNESS OF THE PROSECUTOR. IF EVIDENCE HIGHLY PROBATIVE OF INNOCENCE IS IN HIS FILE, HE SHOULD BE PRESUMED TO RECOGNIZE ITS SIGNIFICANCE EVEN IF HE HAS ACTUALLY OVERLOOKED IT. CF. GIGLIO V. UNITED STATES, 405 U.S. 150, 154.

CONVERSELY, IF EVIDENCE HAS NO PROBATIVE SIGNIFICANCE AT ALL, NO PURPOSE WOULD BE SERVED BY REQUIRING A NEW TRIAL SIMPLY BECAUSE AN INEPT PROSECUTOR INCORRECTLY BELIEVED HE WAS SUPPRESSING A FACT THAT WOULD BE VITAL TO THE DEFENSE. IF THE SUPPRESSION OF EVIDENCE RESULTS IN CONSTITUTIONAL ERROR, IT IS BECAUSE OF THE CHARACTER OF THE EVIDENCE, NOT THE CHARACTER OF THE PROSECUTOR. IT NECESSARILY FOLLOWS THAT IF THE OMITTED EVIDENCE CREATES A REASONABLE DOUBT THAT DID NOT OTHERWISE EXIST, CONSTITUTIONAL ERROR HAS BEEN COMMITTED. THIS MEANS THAT THE ADMISSION MUST BE EVALUATED IN THE CONTEXT OF THE ENTIRE RECORD. IF THERE IS NO REASONABLE DOUBT ABOUT GUILT WHETHER OR NOT THE ADDITIONAL EVIDENCE IS CONSIDERED, THERE IS NO JUSTIFICATION FOR A NEW TRIAL. IT IS THEREFORE CLEAR THAT NO CONSTITUTIONAL ERROR HAS BEEN COMMITTED IN THIS CASE BECAUSE THE ACTUAL RESULTS OF THE TESTS ON THE WEAPONS WERE NOT HARMFUL TO THE DEFENSE AND WOULD NOT HAVE CREATED A REASONABLE DOUBT EVEN IF THE EVIDENCE WERE DISCLOSED TO THE DEFENSE BEFORE THE TRIAL.

IT IS ALSO CLAIMED THAT TRIAL COUNSEL'S FAILURE TO PRESERVE AN OBJECTION TO THE TRIAL COURT'S DENIAL OF A REQUEST FOR ADDITIONAL ALLEGED BRADY MATERIAL CONSTITUTED INEFFECTIVE ASSISTANCE OF COUNSEL. SPECIFICALLY RELATOR CONTENDS THAT THE PROSECUTION'S CHIEF WITNESS, ONE FRANCIS MCGRATH, HAD MADE VARIOUS CONTRADICTORY STATEMENTS TO ONE DETECTIVE MCGILL DURING THE COURSE OF AN INTERVIEW AT POLICE HEADQUARTERS. IT IS RELATOR'S POSITION THAT HE WAS PREVENTED FROM LEARNING OF THIS

INFORMATION UNTIL AFTER THE CLOSE OF THE TRIAL AND THEREFORE PRECLUDED FROM SUBPOENING (SIC) THE DETECTIVE AS A DEFENSE WITNESS. THERE IS HOWEVER, NO FACTUAL BASIS FOR THIS ASSERTION. ON THE CONTRARY, THE STATE COURT RECORD ESTABLISHES THAT DEFENSE COUNSEL LEARNED OF THE INTERVIEW WITH MCGILL DURING HIS CROSS-EXAMINATION OF MCGRATH.

> "QUESTION: YOU WERE THERE ON SUNDAY, RATHER, JUNE 19, IS THAT RIGHT?
>
> ANSWER: THAT IS RIGHT.
>
> QUESTION: AND THAT IS THE TIME YOU TALKED TO DETECTIVE DUFFY, IS THAT RIGHT?
>
> ANSWER: DUFFY.
>
> QUESTION: THEN YOU WENT BACK ON JUNE 21ST, THE MONDAY, IS THAT RIGHT SIR...I AM SORRY, THE 20TH?
>
> ANSWER: THE 20TH, THAT IS RIGHT.
>
> QUESTION: WHO DID YOU TALK TO THEN, BY THE WAY?
>
> ANSWER: I TALKED TO DETECTIVE MCGILL, DETECTIVE BROOKS. I TALKED TO MCGOWEN. I TALKED TO LT. MATTHIS, THAT IS ABOUT ALL I CAN REMEMBER, WHO I TALKED TO."

DESPITE THE INFORMATION ILLICITED (SIC) FROM THIS WITNESS, DEFENSE COUNSEL NEVER ATTEMPTED TO SUBPOENA MCGILL AS A WITNESS NOR DID THEY REQUEST ANY NOTES THAT MIGHT HAVE BEEN TAKEN BY MCGILL OF HIS CONVERSATIONS WITH MCGRATH. ALTHOUGH BRADY REQUIRES THE PROSECUTION TO PROVIDE THE DEFENSE UPON REQUEST WITH MATERIAL IN ITS POSSESSION WHICH WOULD BE BENEFICIAL TO THE DEFENDANT, THE RECORD HERE REFLECTS THAT THERE WAS NO REQUEST FOR SUCH INFORMATION.

HENCE, THERE WAS NO BRADY VIOLATION FOR TRIAL COUNSEL TO PRESERVE. NOR, DO I BELIEVE THAT THE FAILURE TO INTRODUCE THESE ALLEGED INCONSISTENT STATEMENTS FROM THE INTERVIEW CONSTITUTED INEFFECTIVE ASSISTANCE OF COUNSEL. THE STATEMENTS RELATED ONLY TO THE QUESTION OF CARCHIDI'S GUILT OR INNOCENCE. THERE IS, HOWEVER, NO ASSERTION THAT THESE STATEMENTS HAD ANY DIRECT BEARING UPON THE INNOCENCE OF THIS RELATOR. THUS, THE ONLY PURPOSE TO BE SERVED BY THE INTRODUCTION OF THE REMARKS WOULD HAVE BEEN TO IMPEACH MCGRATH'S CREDIBILITY AS A WITNESS IN THE EYES OF THE JURY. THE EXTENT TO WHICH DEFENSE COUNSEL CHOOSES TO PURSUE A COLLATERAL ISSUE IS CLEARLY A MATTER OF JUDGMENT. UPON REVIEW OF THE STATE COURT RECORD I AM SATISFIED THAT THE DEFENSE EXPLORED THE ISSUE AS WELL AS HE DEEMED POSSIBLE. DURING THE COURSE OF THE TRIAL, MCGRATH WAS SKILLFULLY CROSS-EXAMINED BY EXPERIENCED COUNSEL CONCERNING VARIOUS INCONSISTENT REMARKS MADE TO THE POLICE, AT THE MEDICAL EXAMINER'S INQUEST AND TO OTHER INDIVIDUALS. THESE VARIATIONS WERE STRENUOUSLY ARGUED TO THE JURY AS AN ATTACK UPON THE WITNESSES' (SIC) CREDIBILITY. HAVING ATTEMPTED TO IMPEACH THE CREDIBILITY OF THE WITNESS, I BELIEVE THAT COUNSEL'S STEWARDSHIP WAS NOT INEFFECTIVE MERELY BECAUSE HE DID NOT EXPOSE EVERY ARGUABLE INCONSISTENCY IN MCGRATH'S TESTIMONY.

VI.
CONFLICT OF INTEREST

SULLIVAN ALLEGES THAT HE WAS DENIED HIS CONSTITUTIONAL RIGHT TO EFFECTIVE ASSISTANCE OF COUNSEL, AS GUARANTEED BY THE SIXTH AMENDMENT, BECAUSE HIS REPRESENTATION WAS MADE BY TWO

ATTORNEYS WHO WERE BURDENED BY A CONFLICT OF INTEREST BY REASON OF THEIR SIMULTANEOUS REPRESENTATION OF RELATOR'S TWO CO-DEFENDANTS, GREGORY CARCHIDI AND ANTHONY DIPASQUALE. THE COMMONWEALTH, ON THE OTHER HAND, CONTENDS THAT SUCH REPRESENTATION WAS EFFECTIVE, STATING THAT COUNSEL WAS COMPETENT AND THAT HIS ACTIONS HAD A REASONABLE BASIS DESIGNED TO EFFECTUATE RELATOR'S INTERESTS.[7]

RELATOR ADDITIONALLY ASSERTS THAT DEFENSE COUNSELS' DECISION NOT TO PERMIT HIM TO TESTIFY ON HIS OWN BEHALF AND TO PRESENT NO EVIDENCE CONSTITUTED INEFFECTIVE ASSISTANCE OF COUNSEL, IN THAT SUCH DECISIONS WERE NOT BASED ON THE UNDIVIDED ASSESSMENT OF HIS BEST INTEREST, BUT RATHER ON THE CONSIDERATION BY COUNSEL NOT TO REVEAL THE DEFENSE STRATEGY TO BE USED IN THE TRIALS OF HIS CO-DEFENDANTS, WHICH WERE SET AT A LATER DATE. ON THIS ISSUE, THE COMMONWEALTH CONTENDS THAT THE ONLY INTERESTS CONSIDERED AT THE TIME OF SULLIVAN'S TRIAL WERE THOSE OF RELATOR HIMSELF.

SINCE 1942, THE UNITED STATES SUPREME COURT HAS RECOGNIZED THAT A DEFENDANT IS "ENTITLED TO THE UNTRAMMELED AND UNIMPAIRED ASSISTANCE OF COUNSEL FOR HIS DEFENSE." GLASER V. UNITED STATES, 315 U.S. 60, 70 (1942); UNITED STATES V. GEORGE RIPSO, 470 F.2D 1099, 1102 (3RD CIR. 1973); GOVERNMENT OF THE VIRGIN ISLANDS V. JOHN, 447 F.2D 69, 74 (3RD CIR. 1971); WALKER V. UNITED STATES, 422 F.2D 374, 375 (3RD CIR.) CERT DENIED, 399 U.S. 915

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[7] ANSWER TO PETITION FOR WRIT OF HABEAS CORPUS, PAGE 9, AND APPELLEE'S BRIEF, PAGE 39. IT SHOULD INITIALLY BE NOTED THAT RESPONDENT IS REFERRING TO COUNSEL IN THE SINGULAR FORM, SEE FOR EXAMPLE I.D., AT VI A. (ESPECIALLY THE PHRASE "COUNSEL'S ADVICE"), WHEREAS RELATOR USES COUNSEL IN THE PLURAL MEANING OF THE TERM.

(1970). "THE RIGHT TO COUNSEL GUARANTEED BY THE SIXTH AND FOURTEENTH AMENDMENTS CONTEMPLATES THE SERVICE OF ANY ATTORNEY DEVOTED SOLELY TO THE INTERESTS OF HIS CLIENT." UNITED STATES EX REL. HART V. DAVENPORT, 478 F.2D 203, 209 (3RD CIR. 1973) (EMPHASIS ADDED.) WHERE COUNSEL IS FOUND TO BE INEFFECTIVE, THE VERDICT MUST BE SET ASIDE AND A NEW TRIAL GRANTED. GLASER V. UNITED STATES, SUPRA. AT 76. THIS RIGHT TO UNIMPAIRED ASSISTANCE APPLIES BOTH BEFORE TRIAL, IN CONSIDERING HOW TO PLEAD, AS WELL AS DURING THE TRIAL ITSELF. UNITED STATES EX REL. HART V. DAVENPORT, SUPRA. AT 209. THE RIGHT TO COUNSEL "REQUIRES NOTHING LESS THAN THE UNDIVIDED LOYALTY OF COUNSEL IN BEHALF OF HIS CLIENT." UNITED STATES EX REL. PLATTS V. MYERS, 253 F. SUPP 23, 25 (E.D. PA. 1966). NO ONE CONTENDS HERE THAT RELATOR INTELLIGENTLY, KNOWINGLY, AND COMPETENTLY WAIVED HIS CONSTITUTIONAL RIGHT TO COUNSEL AS NECESSARY UNDER JOHNSON V. ZERBST, 304 U.S. 458 (1938) AND UNITED STATES EX REL. HART V. DAVENPORT, SUPRA. AT 211.

IT IS BY UTILIZATION OF THIS BACKGROUND THAT WE MUST DECIDE WHETHER THERE WAS DUAL REPRESENTATION, AND IF SO, WHETHER A POSSIBILITY OF CONFLICT IN SUCH REPRESENTATION WAS EVIDENCED.

ON THE ISSUE OF DUAL REPRESENTATION, THE SUPREME COURT OF PENNSYLVANIA, IN COMMONWEALTH V. SULLIVAN, 371 A.2D 468, HELD THAT:

> "THE TESTIMONY ESTABLISHES THAT THERE WAS NO DUAL REPRESENTATION IN THE TRUE SENSE OF THE TERM, I.E., THE SAME COUNSEL ACTIVELY REPRESENTED CO-DEFENDANTS. MR. PERUTO TESTIFIED THAT IT WAS MR. (NOW JUDGE) DIBONA WHO SERVED AS CHIEF COUNSEL FOR APPELLANT DURING TRIAL AND MADE ALL DECISIONS RELEVANT TO SULLIVAN'S DEFENSE, WHILE HE, MR. PERUTO, WAS MERELY ASSISTING. THESE FUNCTIONS WERE REVERSED AT THE TRIAL OF THE CO-DEFENDANTS WHERE MR. PERUTO WAS CHIEF COUNSEL AND JUDGE DIBONA THE ASSISTANT. THUS, JUDGE DIBONA SERVED ONLY A MINOR ROLE IN THE TRIAL OF THE CO-DEFENDANTS WHILE DEVOTING HIS PRIMARY EFFORTS TO THE SULLIVAN CASE. THIS CONCLUSION IS SUPPORTED BY JUDGE DIBONA'S STATEMENTS THAT HIS STEWARDSHIP WAS IN NO WAY AFFECTED BY HIS CONSIDERATION OF THE CO-DEFENDANT'S (SIC) CASES BUT WAS SOLELY A PRODUCT OF WHAT HE CONSIDERED TO BE THE BEST COURSE IN HIS REPRESENTATION OF SULLIVAN. WE THEREFORE HOLD THAT THERE IS ABSOLUTELY NO EVIDENCE THAT A CONFLICT EXISTED. 371 A.2D AT 486. (EMPHASIS ADDED.)

THE SUPREME COURT BASED ITS DECISION ON THIS CRITICAL ISSUE UPON THE TESTIMONY OF MR. PERUTO, AT LEAST IN GREAT PART, AND THE COMMONWEALTH USES THIS FINDING IN SUPPORT OF ITS ARGUMENT THAT THERE WAS NO DUAL REPRESENTATION. ON THE OTHER HAND, THE COMMONWEALTH HAS VEHEMENTLY REQUESTED THAT WE DO NOT BELIEVE ANYTHING THAT MR. PERUTO SAYS.

> "IN FACT, A REVIEW OF THE WHOLE RECORD SHOWS THAT LITTLE OF MR. PERUTO'S TESTIMONY IS WORTHY OF BELIEF...MR. PERUTO CONSISTENTLY SHOWED A TOTAL DISREGARD FOR THE TRUTH AND REPEATEDLY CONTRADICTED HIMSELF, OTHER WITNESSES AND THE RECORD."[8]

WE ARE THUS SQUARELY FACED WITH TWO DIVERGENT ARGUMENTS PUT FORTH BY THE COMMONWEALTH:

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[8] BRIEF OF APPELLEE AT 43 N. 11.

1. IGNORE MR. PERUTO'S TESTIMONY IN EVERY INSTANCE, BUT

2. ACCEPT THE STATEMENT ON WHICH THE PENNSYLVANIA SUPREME COURT BASED ITS CONCLUSION "THAT THERE IS ABSOLUTELY NO EVIDENCE THAT A CONFLICT EXISTED."

THERE IS SERIOUS DOUBT AS TO WHETHER THE SUPREME COURT REACHED THE CORRECT CONCLUSION ON THE ISSUE OF WHETHER THERE WAS DUAL REPRESENTATION. ALTHOUGH THERE IS SOME FACTUAL BASIS FOR THIS DECISION, IT AGAIN RESTS ON ONE OF MR. PERUTO'S STATEMENTS:

> "Q. (MR. MORAN): YOU ALSO REPRESENTED THE OTHER TWO DEFENDANTS DIPASQUALE AND CARCHIDI IN THIS CASE; IS THAT CORRECT, SIR?
>
> A. (MR. PERUTO): THE OTHER TWO I TRIED. I WAS TRIAL COUNSEL. MR. DIBONA WAS TRIAL COUNSEL FOR MR. SULLIVAN."
> (N.T. POST-CONVICTION, APRIL 25, 1974, P. 90.)

MR. PERUTO'S RECOLLECTION OF HOW THE DEFENDANTS CHOSE WHETHER HE OR JUDGE DIBONA WOULD REPRESENT THEM INDIVIDUALLY WAS BROUGHT OUT ON DIRECT EXAMINATION AT THE POST-CONVICTION HEARING:

> "ALTHOUGH IT APPEARS THAT I'M CO-COUNSEL IN THE CASE OF JOHN SULLIVAN, SUCH WAS NOT COMPLETELY THE CORRECT STATEMENT. THE THREE DEFENDANTS WERE TOGETHER IN THE CELL ROOM WHEN WE WERE READY TO GO TO TRIAL. AND THE THREE OF THEM WERE TOLD NOW THIS IS THE SITUATION, ONE OF US WILL BE PERMITTED TO DO THE CROSS-EXAMINATION AND THE SUMMATIONS AND THE ACTUAL HANDLING OF THE CASE. YOU'RE GOING TO HAVE TO CHOOSE BETWEEN US OR ANY OTHER LAWYER OF YOUR CHOICE. SULLIVAN INDICATED THE DESIRE THAT JUDGE DIBONA WAS OLDER AND MORE EXPERIENCED AND HE ELECTED TO HAVE JUDGE DIBONA TRY HIS CASE. THE OTHER TWO DEFENDANTS ELECTED TO HAVE ME TRY THEIR CASE. JUDGE DIBONA AND I THEN AGREED THAT WHICHEVER OF US WOULD BE SELECTED TO TRY THE CASE THE OTHER OF US WOULD ASSIST, BUT NOT IN THE SENSE OF BEING COEQUAL BUT MERELY TO ASSIST SUCH AS YOU KNOW, GET PAPERS READY OR SOMETHING LIKE THAT."
> (APRIL 25, 1974, P. 108-09.)

HOWEVER, BOTH MR. PERUTO AND JUDGE DIBONA ENTERED APPEARANCES FOR RELATOR AT HIS TRIAL, AND THERE WAS NO DESIGNATION ON THAT RECORD THAT ONE OF THEM WAS CHIEF COUNSEL AND THE OTHER HIS ASSISTANT. THERE IS NO DOUBT THAT BOTH ATTORNEYS WERE ACTIVE DURING THE COURSE OF RELATOR'S TRIAL. ALTHOUGH JUDGE DIBONA WAS THE MAJOR ONE OF THE PAIR WHO ARGUED TO THE JURY, THERE ARE NUMEROUS INSTANCES WHEN MR. PERUTO PRESENTED ARGUMENTS TO THE COURT.[9]

ON THE ADMISSIBILITY OF COMMONWEALTH'S EXHIBITS AT THE CLOSE OF ITS CASE, MR. PERUTO WAS OFTEN THE ONLY ONE DECIDING WHETHER OR NOT TO OBJECT,[10] AND HE ALONE MOVED FOR THE DIRECTED VERDICT OF ACQUITTAL.[11] PERHAPS, MOST SIGNIFICANT IS THE FACT THAT MR. PERUTO ALONE MADE THE ARGUMENT TO THE JURY ON WHETHER THE

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THESE CAN BE FOUND IN THE TRIAL RECORDS AT:

DATE:	PAGES IN RECORD:
1. MAY 17, 1967	48-57
2. JUNE 7, 1967	7-53, 74-76, 121-25, 149-57
3. JUNE 8, 1967	170, 173-175
4. JUNE 13, 1967	656-72, 658
5. JUNE 14, 1967	720-29, 808-09
6. JUNE 15, 1967	934-37, 1000-10, 1064-66, 1072-81
7. JUNE 16, 1967	1094-1131
8. JUNE 18, 1967	1139-40, 1228-30, 1247-67, 1278-80

10
SEE FOR EXAMPLE PAGES 1074-1079.

11
N.T. TRIAL, JUNE 16, 1967, P. 1130.

SENTENCE IMPOSED SHOULD BE LIFE IMPRISONMENT OR DEATH.[12] MR. PERUTO PRESENTED ORAL ARGUMENT TO THE COURT ON NEARLY EVERY ISSUE THAT JUDGE DIBONA DID, WITH THE EXCEPTION OF THE ARGUMENT TO THE JURY ON THE SIGNIFICANT ISSUE OF WHAT SENTENCE WOULD BE IMPOSED, WHERE THE ARGUMENT WAS MADE SOLELY BY MR. PERUTO. ALTHOUGH MR. PERUTO TESTIFIED THAT HIS ROLE WAS NOT THAT OF A COEQUAL TO JUDGE DIBONA, BUT RATHER WAS LIMITED TO "GET(TING) PAPERS READY OR SOMETHING LIKE THAT", (N.T. POST-CONVICTION, APRIL 25, 1974, P. 109) THE AFOREMENTIONED PARTICIPATION STRONGLY REFUTES PERUTO'S RECOLLECTION ON THIS MATTER.

FURTHER, THERE IS OTHER TESTIMONY WHICH REFUTES THE STATE COURT'S CONCLUSION THAT THERE WAS NO DUAL REPRESENTATION BY MR. PERUTO AND JUDGE DIBONA WITH RESPECT TO THE THREE DEFENDANTS, SHOWING INSTEAD THAT JUDGE DIBONA ALONE WAS CHIEF COUNSEL FOR SULLIVAN, WHILE MR. PERUTO SERVED IN THE SAME ROLE FOR RELATOR'S CO-DEFENDANTS. FOR EXAMPLE, THE RECORD OF THE PRE-TRIAL CONFERENCES REVEALS THAT JUDGE DIBONA REPRESENTED CARCHIDI.[13] CONTRAST WITH THIS, MR. PERUTO'S STATEMENT: "I INSIST ON BEHALF OF MY OTHER CLIENT DIPASQUALE AND THE MAN THAT I NOW REPRESENT TOGETHER WITH JUDGE (SIC) DIBONA, MR. SULLIVAN..." (N.T. TRIAL, MAY 11, 1967, P. 3). EVEN JUDGE DOTY, IN HIS OPINION AFTER THE POST-CONVICTION HEARING, SAID: "A. CHARLES PERUTO, DEFENDANT'S CO-COUNSEL..." (NOVEMBER 6, 1974, AT P. 3.) (EMPHASIS ADDED.)

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[12] N.T. TRIAL, JUNE 19, 1967, P. 1247-1264.

[13] APPELLEE'S BRIEF, AT 43 N. 11. ADDITIONALLY, JUDGE DIBONA REFERRED TO GREGORY CARCHIDI AS HIS OTHER CLIENT IN THE BEGINNING OF THE TRIAL ITSELF. (N.T. TRIAL, MAY 11, 1967, P. 3.)

MOREOVER, ACCORDING TO MR. PERUTO, HE MADE THE DECISION THAT THE DEFENSE SHOULD NOT PRODUCE ANY EVIDENCE. CONSIDER THE FOLLOWING EXCHANGE ON DIRECT EXAMINATION:

> "Q. WAIT JUST A MINUTE, SIR. YOU WERE CONCERNED WITH THE OTHER TWO DEFENDANTS YOU REPRESENTED; IS THAT CORRECT?
>
> A. (BY MR. PERUTO). YES. WHY EXPOSE YOUR DEFENSE IF YOU HAVE GOT TWO MORE PEOPLE TO COME TO TRIAL AND THE COMMONWEALTH HAS NOT PRESENTED A CASE?
>
> Q. SO THAT ENTERED INTO YOUR CONSIDERATION AS TO WHETHER OR NOT YOU PRESENTED A DEFENSE IN THE SULLIVAN CASE?
>
> A. SURE, IT DID." (EMPHASIS ADDED.)

(N.T. POST-CONVICTION, APRIL 25, 1974, P. 101.)

FURTHER, AT TRIAL, MR. PERUTO STATED THAT "MR. DIBONA HAS ENTRUSTED THE DEFENSE TO ME AND THE DEFENSE RESTS." (EMPHASIS ADDED.) (N.T. TRIAL, JUNE 16, 1967, P. 1128.) HAD JUDGE DIBONA NOT SO ENTRUSTED THE DEFENSE, SURELY HE WOULD HAVE SAID SO AT THAT POINT. SEE ALSO MR. PERUTO'S DISCUSSION WITH SULLIVAN AS RECREATED BY RELATOR AT NOTES OF TESTIMONY POST-CONVICTION, MARCH 25, 1974, P. 156-60.

THE FACTS ESTABLISHED ON THE RECORD SHOW A PREPONDERANCE OF TESTIMONY WHICH LEADS ONE TO CONCLUDE THAT THE STATE COURT'S CONCLUSION IS NOT SUPPORTED BY CREDIBLE EVIDENCE. 28 U.S.C. §2254(D)(8) PROVIDES IN PART THAT IN HABEAS PROCEEDINGS, DETERMINATIONS OF FACTUAL ISSUES ARE PRESUMED CORRECT UNLESS THE FEDERAL COURT, CONSIDERING THE RECORD AS A WHOLE, CONCLUDES THAT SUCH FACTUAL DETERMINATION IS NOT FAIRLY SUPPORTED BY THE RECORD.

OUR INDIVIDUAL DETERMINATION "IS IN NO WAY FORECLOSED...BY THE FACT THAT THE STATE TRIAL JUDGE OR THE JURY MAY HAVE REACHED A DIFFERENT RESULT ON THIS ISSUE," HAYNES V. WASHINGTON, 373 U.S. 503, 515 (1963), BECAUSE AS A FEDERAL COURT, WE ARE UNDER A DUTY TO "MAKE AN INDEPENDENT EXAMINATION OF THE RECORD TO DETERMINE WHETHER THOSE (STATE COURT) CONCLUSIONS ARE SUPPORTED BY THE EVIDENCE." DODGE V. JOHNSON, 471 F.2D 1249, 1250 (6TH CIR.) CERT DENIED, 412 U.S. 931 (1973).

IN ADDITION TO THE STATE COURT'S FACTUAL CONCLUSION THAT THERE WAS NO DUAL REPRESENTATION, A LEGAL DETERMINATION THAT NO CONFLICT EXISTED WAS MADE BY THE COURT. YET,

> "ALTHOUGH THE DISTRICT JUDGE MAY WHERE THE STATE COURT HAS RELIABLY FOUND THE RELEVANT FACTS, DEFER TO THE STATE COURT'S FINDINGS OF FACT, HE MAY NOT DEFER TO HIS FINDINGS OF LAW. IT IS THE DISTRICT JUDGE'S DUTY TO APPLY FEDERAL LAW TO THE STATE COURT FACT FINDINGS INDEPENDENTLY. THE STATE CONCLUSIONS OF LAW MAY NOT BE GIVEN BINDING WEIGHT ON HABEAS." TOWNSEND V. SAIN, 372 U.S. 293, 312 (1963).

BECAUSE OF THE OVERWHELMING EVIDENCE, REFUTING THE SUPREME COURT'S FACTUAL CONCLUSION THAT MR. PERUTO WAS MERELY AN ASSISTANT AT SULLIVAN'S TRIAL, WE FIND THAT SUCH DETERMINATION IS NOT FAIRLY SUPPORTED BY THE RECORD AS A WHOLE, AND THE COURT'S LEGAL CONCLUSION THAT THERE WAS NO DUAL REPRESENTATION NEED NOT BE ACCEPTED BY US, UNDER THE GOVERNING STANDARDS OF TOWNSEND.

YET, DUAL REPRESENTATION OF CRIMINAL DEFENDANTS TRIED TOGETHER IS NOT NECESSARILY A DEPRIVATION OF THEIR SIXTH AMENDMENT RIGHTS TO EFFECTIVE ASSISTANCE OF COUNSEL. UNITED STATES

EX REL. SMALL V. RUNDLE, 442 F.2D 235, 237 (3RD CIR. 1971); WALKER V. UNITED STATES, SUPRA. AT 375; UNITED STATES EX REL. SMITH V. STATE, 341 F. SUPP. 268, 271 (D.C. N.J. 1972); UNITED STATES EX REL. PARIS V. BRIERLEY, 315 F. SUPP. 1392, 1395 (W.D. PA. 1970). "WHETHER OR NOT ACTUAL PREJUDICE EXISTED, IT IS SUFFICIENT TO CONSTITUTE A VIOLATION OF THE RELATOR'S CONSTITUTIONAL RIGHTS IF THE LAWYER IS SERVING CONFLICTING INTERESTS." UNITED STATES EX REL. PLATTS V. MYERS, SUPRA AT 25. SEE ALSO UNITED STATES EX REL. MARTINAS V. BRIERLEY, 273 F. SUPP. 260, 261 (E.D. PA. 1967).

"THERE MUST BE A SHOWING OF POSSIBLE CONFLICT OF INTEREST OR PREJUDICE, HOWEVER REMOTE, BEFORE A REVIEWING COURT WILL FIND DUAL REPRESENTATION CONSTITUTIONALLY DEFECTIVE." UNITED STATES EX REL. HORTA V. DEYOUNG, 523 F.2D 807, 808-09 (3RD CIR. 1975); UNITED STATES EX REL. HART V. DAVENPORT, 478 F.2D 203, 210 (3RD CIR. 1973).[14] THIS "POSSIBLE CONFLICT" TEST IS USED BECAUSE "THE RIGHT TO HAVE ASSISTANCE OF COUNSEL IS TOO FUNDAMENTAL AND ABSOLUTE TO ALLOW COURTS TO INDULGE IN NICE CALCULATIONS AS TO THE AMOUNT OF PREJUDICE ARISING FROM ITS DENIAL." UNITED STATES

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[14] SEE ALSO UNITED STATES V. RISPO, SUPRA, AT 1102; UNITED STATES V. RISPO, 460 F.2D 965, 970 (3RD CIR. 1972); UNITED STATES EX REL. SMALL V. RUNDLE, SUPRA, AT 237-38; WALKER V. UNITED STATES, SUPRA. AT 375; BOEHMER V. UNITED STATES, 414 F. SUPP. 766, 770 (E.D. PA. 1976); UNITED STATES EX REL. MORGAN V. KEVE, 425 F. SUPP. 585, 587 (D.C. DEL. 1976); UNITED STATES EX REL. CLARK V. GUY, 386 F. SUPP. 1175, 1176 (E.D. PA. 1975); UNITED STATES EX REL. SMITH V. STATE. 341 F. SUPP. 268, 271 (D.C. N.J. 1972).

EX REL. HORTA V. DEYOUNG, SUPRA. AT 809, QUOTING GLASER V. UNITED STATES, SUPRA. AT 76.[15] (EMPHASIS ADDED.)

TO SEE WHETHER THERE WAS A "SHOWING OF POSSIBLE CONFLICT", THE COURT SHOULD LOOK AT THE RECORD AND ASK "WHETHER OR NOT SEPARATE REPRESENTATION MIGHT HAVE MADE A DIFFERENCE IN PETITIONER'S CHOICE OF DEFENSE STRATEGY THAT MIGHT HAVE DIFFERENTIATED (DEFENDANT'S) POSITION FROM THAT OF (HIS) CO-DEFENDANT." UNITED STATES EX REL. MORGAN V. KEVE, SUPRA. AT 589; UNITED STATES EX REL. HORTA V. DEYOUNG. SUPRA. AT 809. THE TRIAL DEFENSE SHOULD BE EXAMINED AND ANY PLACES WHERE SEPARATE COUNSEL, WITHOUT POSSIBLE CONFLICTING DUTIES, COULD HAVE TAKEN MORE SUCCESSFUL "TACK" THAN WAS TAKEN BY JOINT COUNSEL SHOULD BE IDENTIFIED. UNITED STATES EX REL. MORGAN V. KEVE, ID. SEE ALSO UNITED STATES EX REL. HORTA V. DEYOUNG, SUPRA. AT 809. ANY CLAIMS OF CONFLICT OF INTEREST MUST BE BASED ON SOME FORM OF FACTUAL SUPPORT. BOEHMER V. UNITED STATES, SUPRA. AT 770. BECAUSE THE RESOLUTION WHETHER A CONFLICT OF

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15 THE TEST FOR POSSIBLE CONFLICTS OF INTEREST MUST BE MADE IN LIGHT OF THE NORMAL COMPETENCY STANDARD FOR ADEQUATE REPRESENTATION. UNITED STATES EX REL. HART V. DAVENPORT, SUPRA. AT 210; UNITED STATES EX REL. GREEN V. RUNDLE, 434 F.2D 1112, 1113 (3RD CIR. 1970); MOORE V. UNITED STATES, 432 F.2D 730, 737 (3RD CIR. 1970); UNITED STATES EX REL. CLARK V. GUY, 386 F. SUPP. 1175, 1177 (E.D. PA. 1974). BOTH THE STATE AND FEDERAL STANDARDS FOR THE REQUIREMENT OF NORMAL COMPETENCY ARE THE SAME, AND THE ULTIMATE ISSUE IS NOT WHETHER A DEFENDANT WAS PREJUDICED BY HIS COUNSEL'S ACT OR OMISSION, BUT WHETHER COUNSEL'S PERFORMANCE WAS AT THE LEVEL OF NORMAL COMPETENCY." MOORE V. UNITED STATES, 423 F.2D 730, 737 (3RD CIR. 1970). SEE ALSO UNITED STATES EX REL. GREEN V. RUNDLE, SUPRA. AT 1113. NORMAL COMPETENCY INCLUDES SUCH ADHERENCE TO ETHICAL STANDARDS WITH RESPECT TO AVOIDANCE OF CONFLICTING INTERESTS AS IS GENERALLY EXPECTED FROM THE BAR, UNITED STATES EX REL. HART V. DAVENPORT, SUPRA. AT 210, INCLUDING ADHERENCE TO CANON 5. UNITED STATES EX REL. CLARK V. GUY, SUPRA. AT 1177.

INTEREST, OR A POSSIBILITY OF THE SAME, WAS EVIDENCED VIA THE EVEN PARTIAL DUALITY IS DEPENDENT ON THE CIRCUMSTANCES AS A WHOLE, IT IS NECESSARY THAT THE TRIAL AND POST-CONVICTION HEARING RECORDS BE EXAMINED FULLY, INCLUDING ANY STATEMENTS MADE DURING THESE PROCEEDINGS BY EITHER JUDGE DIBONA OR MR. PERUTO.

RELATOR'S ALLEGATIONS OF INEFFECTIVENESS OF COUNSEL CENTER ON COUNSELS' REFUSAL TO PERMIT RELATOR TO TESTIFY ON HIS OWN BEHALF AND ON THEIR DECISION NOT TO PRESENT ANY EVIDENCE AND THUS WE MUST LOOK FIRST TO THE RECORDS TO DETERMINE WHETHER THEY OFFER FACTUAL SUPPORT FOR SUCH CONTENTIONS. THERE ARE NUMEROUS INSTANCES OF SUCH A POSSIBILITY OF CONFLICT EVIDENCED HERE, WHETHER THE DECISION FOR RELATOR NOT TO TESTIFY MAY HAVE NOT BEEN TRULY HIS OWN, BUT RATHER MADE BY THE TWO ATTORNEYS. FOR EXAMPLE, SULLIVAN CONTENDS THAT HE WANTED TO TESTIFY AND THAT HE COMMUNICATED THIS TO HIS ATTORNEYS. (N.T. POST-CONVICTION, MARCH 25, 1974, P. 155). CARCHIDI SUPPORTS SULLIVAN'S MEMORY ON THIS POINT. (N.T. POST-CONVICTION, AUGUST 6, 1974, P. 83.) ADDITIONALLY, ON SULLIVAN'S CROSS-EXAMINATION, THE FOLLOWING EXCHANGE TOOK PLACE:

> "Q. NOW YOU INDICATE THAT YOU WANTED TO TESTIFY.
>
> A. YES, SIR.
>
> Q. AND WHO MADE THE FINAL DECISION, WHICH OF THE THREE OF YOU? (SULLIVAN, MR. PERUTO, OR JUDGE DIBONA).
>
> A. I HAD NOTHING TO DO WITH THE DECISION. IT WAS GIVEN TO ME POINT BLANK. AND MR. PERUTO, AFTER LIKE I SAY HOURS OF DISCUSSION, MR. PERUTO SAID SOMETHING TO THE EFFECT OF, 'LOOK, WE'RE THE ATTORNEYS.

> YOU DON'T KNOW ANYTHING ABOUT LAW'-- I'M NOT QUOTING HIM VERBATIM, I'M USING MY OWN LANGUAGE -- AND YOUR LIFE IS IN MY HANDS AND WE'RE OUT TO PROTECT IT, AND YOU'RE NOT TO WORRY, THAT YOU'LL BE ACQUITTED AND WE'RE ASSURED THAT YOU'LL BE ACQUITTED. AND I SAID, 'LOOK, YOU GOT IT, YOU GOT THE BALL, CARRY IT'." (N.T. POST-CONVICTION, MARCH 25, 1974, P. 196.)

MR. PERUTO'S RECOLLECTION OF HOW THE DECISION WAS MADE FOR RELATOR NOT TO TESTIFY WAS BROUGHT OUT ON HIS DIRECT EXAMINATION:

> "Q. WELL, I WANT TO KNOW IF IT WAS YOU WHO URGED HIM NOT TO TESTIFY.
>
> MR. LUNKENHEIMER: IF ANYONE.
>
> MR. MORAN: IF ANYONE, NATURALLY.
>
> THE WITNESS: SINCE I DON'T RECALL, I'LL PUT IT THIS WAY: WHICH OF THE TWO OF US URGED HIM TO TESTIFY OR DID NOT, OR WHETHER I DID IT AS A RESULT OF BEING SORT OF A DEVIL'S ADVOCATE -- I REPRESENT HIM REGULARLY, JUDGE -- I WOULD SAY THAT I WOULD ACCEPT JUDGE DIBONA'S RECOLLECTION. AND IT DOES SEEM TO MY RECOLLECTION MORE IN KEEPING WITH WHAT I WOULD HAVE DONE <u>BECAUSE OF THE OTHER TWO DEFENDANTS YET TO TESTIFY</u>." (N.T. POST-CONVICTION, APRIL 25, 1974, P. 102-104.) (EMPHASIS ADDED.)

ALTHOUGH JUDGE DIBONA ACKNOWLEDGES THAT SHORTLY AFTER MR. PERUTO URGED RELATOR NOT TO TESTIFY THAT SULLIVAN MADE THE DECISION NOT TO DO SO. (N.T. POST-CONVICTION, MAY 15, 1974, P. 16). HE CLAIMS THAT HE FELT THAT SULLIVAN SHOULD TESTIFY AND THAT RELATOR WAS THE ONE WHO HIMSELF MADE THE OPPOSITE DECISION. (N.T. POST-CONVICTION, APRIL 25, 1974, P. 19-20). ON THE BASIS OF THESE DISPUTED FACTS, THE SUPREME COURT HELD THAT MR. DIBONA'S DECISIONS ON NOT ALLOWING RELATOR TO TESTIFY ON HIS OWN BEHALF WERE TACTICAL ONLY. 371 A.2D AT 487.

IN HIS OPINION, AFTER THE POST-CONVICTION HEARING, JUDGE DOTY FOUND AT PAGE 8 THAT:

> "JUDGE DIBONA TESTIFIED THAT THE DEFENDANT WAS FULLY CONSULTED CONCERNING HIS RIGHT TO TESTIFY AND THAT THE DECISION OF DEFENDANT NOT TO TESTIFY WAS MADE JOINTLY BY COUNSEL AND THE CLIENT. WE SEE NO QUESTION OF INEFFECTIVE ASSISTANCE OF COUNSEL HERE."

AGAIN, FEDERAL COURTS ARE NOT BOUND BY SUCH CONCLUSIONS UNLESS SUPPORTED FACTUALLY ON THE RECORD, AND THERE HAS BEEN AMPLE TESTIMONY HERETOFORE TO SHOW THAT JUDGE DOTY DID NOT CONSIDER ALL OF THE EVIDENCE PRESENTED FROM THE POST-CONVICTION RECORD FULLY ENOUGH TO ADEQUATELY SUPPORT HIS FINDING ON THIS ISSUE.

THEREFORE, THE DECISION WHETHER OR NOT SULLIVAN SHOULD TESTIFY ON HIS OWN BEHALF MAY NOT HAVE BEEN MADE SOLELY BY HIM. RATHER, THERE IS A PREPONDERANCE OF EVIDENCE TO SUPPORT THE INFERENCE THAT THE TWO ATTORNEYS, EITHER SINGULARLY OR IN CONSORT, AT THE VERY LEAST <u>INFLUENCED</u> RELATOR'S CHOICE, IF THEY DID NOT ACTUALLY MAKE SUCH DECISION ON THEIR OWN. BECAUSE THERE IS AT LEAST A <u>POSSIBILITY</u> THAT EITHER MR. PERUTO OR JUDGE DIBONA WERE BURDENED BY A CONFLICT OF INTEREST AT THE TIME SUCH DECISION WAS MADE, INEFFECTIVE ASSISTANCE OF COUNSEL HAS BEEN DEMONSTRATED.

ON THE ISSUE OF WHETHER COUNSELS' DECISION NOT TO PRESENT ANY EVIDENCE WAS BURDENED WITH A POSSIBILITY OF CONFLICT, RELATOR ALLEGES THAT HAD COUNSELS' DECISIONS BEEN BASED ON AN UNFETTERED AND UNDIVIDED ASSESSMENT OF HIS BEST INTERESTS, SEVERAL PIECES

OF EVIDENCE MIGHT HAVE BEEN BROUGHT FORTH AT TRIAL. HE CONTENDS THAT THEIR DECISION WAS BASED ON THE CONSIDERATION NOT TO REVEAL THE DEFENSE STRATEGY TO BE USED IN THE TRIAL OF HIS CO-DEFENDANTS. THE SUPREME COURT FOUND JUDGE DIBONA'S DECISION ON THIS ISSUE AGAIN TO BE TACTICAL ONLY, AND NOT THE RESULT OF ANY DUAL REPRESENTATION:

> "IN THE INSTANT CASE, JUDGE DIBONA BELIEVED THAT THERE WAS INSUFFICIENT EVIDENCE UPON WHICH TO CONVICT SULLIVAN. HE THEREFORE REFRAINED FROM CALLING ANY DEFENSE WITNESSES TO AVOID THE POSSIBILITY OF EXPOSING THEM TO CROSS-EXAMINATION THROUGH WHICH THE PROSECUTION MIGHT HAVE EXTRACTED THOSE ELEMENTS NECESSARY TO COMPLETE THEIR PROOF....IN VIEW OF THE CLOSE QUESTION OF THE SUFFICIENCY OF THE EVIDENCE ON THIS RECORD, WE FIND THAT THE COURSE CHOSEN BY JUDGE DIBONA COULD NOT BE TERMED UNREASONABLE." 371 A.2D AT 487.

THE MOST CONCRETE TESTIMONY INDICATING THAT SUCH FACTUAL DETERMINATION IS UNSUPPORTED BY THE RECORD IS EVIDENCED BY MR. PERUTO'S TESTIMONY WHEN HE SAID:

> "Q. WELL, AT ANY RATE YOU HAD MADE A DECISION NOT TO PRESENT ANY TESTIMONY ANYWAY, HADN'T YOU?
>
> A. IN THE SULLIVAN TRIAL?
>
> Q. THE SULLIVAN CASE, YES.
>
> A. YES. I CAN RECALL THE GREAT DISCUSSIONS THAT WE HAD WITH SULLIVAN WHERE WE WERE SO CONVINCED THAT -- AND WE COMMUNICATED THIS TO SULLIVAN --
>
> THE COURT: WHEN YOU SAY GREAT DISCUSSION, YOU MEAN LENGTHY DISCUSSION?

> THE WITNESS: LENGTHY DISCUSSION, YES, SIR. WHERE WE FELT THAT HE COULDN'T POSSIBLY BE CONVICTED AND, THEREFORE, WHAT'S THE SENSE IN EXPOSING THE DEFENSE BECAUSE WE HAD TWO MORE DEFENDANTS TO TRY.
>
> BY MR. MORAN:
>
> Q. WAIT --
>
> A. AND I'M AFRAID SULLIVAN SUFFERED BY THAT FACT.
>
> Q. WAIT JUST A MINUTE, SIR. YOU WERE CONCERNED WITH THE OTHER TWO DEFENDANTS YOU REPRESENTED; IS THAT CORRECT?
>
> A. YES. WHY EXPOSE YOUR DEFENSE IF YOU'VE GOT TWO MORE PEOPLE TO COME TO TRIAL AND THE COMMONWEALTH HAS NOT PRESENTED A CASE?
>
> Q. SO THAT ENTERED INTO YOUR CONSIDERATION AS TO WHETHER OR NOT YOU PRESENTED A DEFENSE IN THE SULLIVAN CASE?
>
> A. SURE, IT DID. WHEN WE'RE TALKING ABOUT BACK AND FORTH. FOR EXAMPLE, I'VE HEARD JUDGE DIBONA TESTIFY TODAY, AND, YES, WE WERE SORT OF PLAYING DEVIL'S ADVOCATE. I DIDN'T WANT THE DEFENSE TO GO ON BECAUSE I THOUGHT WE WOULD ONLY BE EXPOSING THE DEFENDANT WITNESSES FOR THE OTHER TWO TRIALS THAT WERE COMING UP. NOW ON THE OTHER HAND, YOU SEE, THE THREE DEFENDANTS HAD ALREADY DECIDED BETWEEN THEMSELVES WHICH OF US THEY WANTED TO BE CHIEF COUNSEL. JOHN SULLIVAN PICKED FRED DIBONA, THE OTHER TWO DEFENDANTS PICKED ME. SO CERTAINLY I HAD TO BE CHIEF COUNSEL AND FACE THE TRIAL OF THE OTHER TWO MEN. AND AS I LOOK BACK ON THAT, ALTHOUGH IT WAS NOT MY THOUGHT THAT JOHN SULLIVAN SHOULD BE SHORT-CHANGED IN ANY FASHION, I'M AFRAID THAT IT WAS MY THOUGHT THAT I WAS OVER-SOLICITOUS FOR THE OTHER TWO DEFENDANTS BEING READY TO BE TRIED." (N.T. POST-CONVICTION, APRIL 24, 1974, P 100-102.) (EMPHASIS ADDED.)

ADDITIONALLY, RELATOR POINTS TO SEVERAL PIECES OF EVIDENCE WHICH MAY HAVE BEEN ADDUCED AT TRIAL HAD COUNSELS' LOYALTIES BEEN UNDIVDED. FIRST, MICHAEL HESSION COULD ALLEGEDLY HAVE

TESTIFIED AT THE TRIAL TO CONTRADICT THE COMMONWEALTH'S MAJOR WITNESS, FRANCIS MCGRATH, AS MR. HESSION DID AT THE TRIALS OF RELATOR'S CO-DEFENDANTS. JUDGE DIBONA CONTENDS THAT HESSION WOULD NOT TESTIFY FOR SULLIVAN BECAUSE OF THE POWER PLAY IN THE UNION HIERARCHY. (N.T. POST-CONVICTION, APRIL 25, 1974, P. 99-100.) JUDGE DIBONA KNEW OF HESSIAN AND HE STATED THAT "WE DISCUSSED WITH MR. HESSIAN AT THAT TIME, MR. PERUTO AND I DID, DURING THE COURSE OF THE TRIAL HIS BEING A WITNESS. WE CONCLUDED THAT HE WOULD BE OF NO VALUE TO US AS A WITNESS...AND BASED ON THAT WE MADE A TACTICAL DECISION THAT THERE'D BE NO SENSE CALLING HIM." (N.T. POST-CONVICTION, APRIL 25, 1974, P. 20-21.) (EMPHASIS ADDED.) AGAIN WE ARE CONFRONTED WITH THE FACT THAT JUDGE DIBONA'S ANALYSIS OF THE ISSUES WAS NOT HIS SOLE CRITERION ON WHICH HE BASED HIS TACTICAL DECISIONS: MR. PERUTO'S IDEAS CERTAINLY APPEAR TO HAVE CARRIED SOME WEIGHT, IF NOT EQUAL WEIGHT, IN JUDGE DIBONA'S FINAL DECISION. YET JUDGE DIBONA SAYS IT WAS HE WHO MADE THE FINAL DECISION ON THIS ISSUE. (N.T. POST-CONVICTION, APRIL 24, 1974, P. 108.)

GREGORY CARCHIDI WAS WILLING TO TESTIFY FOR SULLIVAN TO CONTRADICT SOME OF MCGRATH'S STATEMENTS. (N.T. POST-CONVICTION, AUGUST 6, 1974, P 8.) THUS, COUNSEL FOR RELATOR WAS FACED WITH DECIDING WHETHER TO USE CARCHIDI AS A WITNESS, EVEN THOUGH COUNSEL SIMULTANEOUSLY REPRESENTED CARCHIDI. AT LEAST PERUTO HAD ALREADY DECIDED NOT TO PUT CARCHIDI ON THE WITNESS STAND, AS EVIDENCED BY THIS DISCUSSION AT TRIAL:

> "PERUTO: YOU PUT ME IN THIS POSITION; A STATEMENT BY CARCHIDI OFFERED INTO EVIDENCE AND CAN ONLY BE REFUTED BY CARCHIDI.
>
> THE COURT: IT IS THE LAW BECAUSE A DEFENDANT REFUSES TO TESTIFY HE CAN'T OFFER SOMETHING.
>
> PERUTO: THE DEFENDANT CAN TESTIFY, BUT HOW CAN HE TESTIFY TO WHAT CARCHIDI SAID AND YOU CAN'T PUT CARCHIDI ON THE RECORD." (N.T. TRIAL, JUNE 13, 1967, P. 672.)

IN JUDGE DIBONA'S OPENING STATEMENT, HE TOLD THE JURY THAT HE WOULD SHOW THAT MCGRATH (ONE OF THE COMMONWEALTH'S WITNESSES) WAS MISTAKEN, AND BY IMPLICATION THE ONLY WAY HE COULD DO SO WAS BY CALLING OTHER WITNESSES TO REFUTE MCGRATH. (SEE N.T. TRIAL, P. 90-91.) RELATOR ALLEGES THAT HE WANTED COUNSEL TO CALL THESE OTHER WITNESSES, AND THAT HE REQUESTED THAT COUNSEL DO SO, TO NO AVAIL. (N.T. POST-CONVICTION, MARCH 25, 1974, P. 155-164.)

RELATOR'S RECOLLECTION OF THIS CONVERSATION IS SUPPORTED BY MR. PERUTO'S OWN TESTIMONY ON DIRECT EXAMINATION:

> "Q. DID YOU ADVISE THE DEFENDANT SULLIVAN WHEN YOU WERE CONSIDERING WHETHER OR NOT TO PUT ON A DEFENSE THAT THESE THREE WITNESSES WERE AVAILABLE AND COULD HELP THIS DEFENSE?
>
> A. I DON'T RECALL ADVISING HIM OF THAT, BUT I DO RECALL THAT I FELT THAT IT MIGHT BE DANGEROUS BECAUSE ONE OF THE OTHER TWO DEFENDANTS LEAVING IN A HURRY MIGHT HAVE BEEN SEEN BY THOSE THREE WITNESSES AND IT MIGHT HAVE DAMAGED THAT DEFENDANT AND IT MIGHT HAVE COME OUT ON THE CROSS-EXAMINATION OF THOSE WITNESSES IN SULLIVAN'S CASE.
>
> Q. (SIC) YES, SIR. AND THERE A MATTER OF JUDGMENT IN THE SENSE THAT WE FELT THAT THE ONLY THING THAT THEY HAD WAS THE MERE STATEMENT OF MCGRATH AND THAT THE CASE WOULD NOT EVEN GO TO THE JURY." (EMPHASIS ADDED.)

MOREOVER, THE BRIEF FOR APPELLANT AT 44 AND MR. PERUTO'S TESTIMONY AT THE POST-CONVICTION HEARING, APRIL 25, 1974, AT P. 107, LEND SUPPORT TO RELATOR'S ALLEGATION THAT ANOTHER WITNESS WAS AVAILABLE TO REFUTE THE COMMONWEALTH'S EVIDENCE. RELATOR WAS NEVER MADE AWARE OF MANY FACTORS WHICH COULD HAVE BEEN USED AS A DEFENSE (N.T. POST-CONVICTION, APRIL 25, 1974, P. 104-107), WHICH HE DISCOVERED AFTER THE TRIAL WAS ENDED. (N.T. POST-CONVICTION, APRIL 25, 1967, P. 165-167.)

JUDGE DIBONA'S REASON FOR NOT CALLING ANY OF THE ABOVE WITNESSES WAS THAT ONCE SULLIVAN HAD DECIDED NOT TO TESTIFY, "THERE WAS NO OTHER REAL GOOD EVIDENCE THAT WE HAD, THAT I THOUGHT SHOULD BE OFFERED." (N.T. POST-CONVICTION, APRIL 25, 1974, P. 19-20.) THERE IS THE POSSIBILITY THAT MR. PERUTO'S DECISION OR ADVICE ON THIS MATTER MAY HAVE INFLUENCED JUDGE DIBONA, BECAUSE IN FACT NONE OF THE WITNESSES WHO (SIC) RELATOR WANTED WERE EVER CALLED. IT IS MOST APPARENT FROM THE TESTIMONY QUOTED ABOVE THAT AT LEAST MR. PERUTO HAD DIVIDED LOYALTY BETWEEN RELATOR AND THE TWO CO-DEFENDANTS WHOM MR. PERUTO ALLEGEDLY REPRESENTED AS LEAD COUNSEL.

WE ARE THUS OBLIGED TO SPECULATE WHETHER OR NOT INDEPENDENT COUNSEL WOULD HAVE PERMITTED THESE WITNESSES, SEVERAL OF WHOM ARE SINCE DECEASED, TO TESTIFY IN BEHALF OF RELATOR. ALTHOUGH THIS IS NOT ANY EASY SPECULATION, IT IS APPARENT THAT THE FINAL DECISION ON THESE MATTERS WAS NOT ENTIRELY THAT OF JUDGE DIBONA,

BUT RATHER WAS MADE AT LEAST IN PART BY MR. PERUTO. IT SHOULD BE NOTED THAT AT THE CONCLUSION OF THE COMMONWEALTH'S CASE, MR. PERUTO STATED: "MR. DIBONA HAS ENTRUSTED THE DEFENSE TO ME AND THE DEFENSE RESTS." (N.T. TRIAL, JUNE 16, 1967, P. 1128.) (EMPHASIS ADDED.) ALTHOUGH WE ARE UNSURE OF WHO CARCHIDI'S "MAIN" COUNSEL WAS, EVERYONE AGREES THAT MR. PERUTO FUNCTIONED AS THE PRINCIPAL COUNSEL FOR DIPASQUALE.

MR. PERUTO'S CONCERN FOR HIS OTHER CLIENTS, COMBINED WITH HIS ACTIVE PARTICIPATION THROUGHOUT THE COURSE OF RELATOR'S TRIAL AND THE ENTRUSTING TO HIM OF RELATOR'S DEFENSE, LEAVES ME NO CHOICE BUT TO CONCLUDE THAT THERE WAS AT LEAST A POSSIBILITY OF CONFLICT OF INTEREST IN THE DUAL REPRESENTATION. RELATOR'S CONVICTION UNDER THESE CIRCUMSTANCES CARRIES WITH IT SUCH A POTENTIAL FOR INVASION OF CONSTITUTIONAL RIGHTS THAT (SIC) SHOULD BE VACATED.

THE COURT IS NOT UNMINDFUL THAT UNDER OUR SYSTEM, THE ADMINISTRATION OF CRIMINAL JUSTICE IS GENERALLY COMMITTED TO THE SEVERAL STATES; THAT DUE PROCESS OF LAW "IS NOT TO BE TURNED INTO A DESTRUCTIVE DOGMA AGAINST THE STATES IN THE ADMINISTRATION OF THE SYSTEMS OF CRIMINAL JUSTICE." ROCHIN V. PEOPLE OF CALIFORNIA, SUPRA; THAT IN THE ENFORCEMENT OF THEIR CRIMINAL LAWS, STATES HAVE COMPREHENSIVE RIGHTS IN FASHIONING THEIR OWN RULES. KNAPP V. SCHWEITZER, 357 U.S. 371, REHEARING DENIED 358 U.S. 860 (1958). HOWEVER, THIS COURT IN REVIEWING APPLICATION FOR HABEAS CORPUS RELIEF TOO HAS ITS RESPONSIBILITY. REGARD FOR

REQUIREMENTS OF THE DUE PROCESS CLAUSE "INESCAPABLY IMPOSES ON THIS COURT AN EXERCISE OF JUDGMENT UPON THE WHOLE COURSE OF THE PROCEEDINGS (RESULTING IN A CONVICTION) IN ORDER TO ASCERTAIN WHETHER THEY OFFEND THE CANNONS (SIC) OF DECENCY AND FAIRNESS.... EVEN TOWARDS THOSE CHARGED WITH THE MOST HEINOUS OFFENSES." MALINSKI v. NEW YORK, 324 U.S. 401 AT 416-417.

FOR THE FOREGOING REASONS, RELATOR'S CONVICTION OF FIRST DEGREE MURDER WAS NOT ATTENDED BY THE FUNDAMENTAL FAIRNESS REQUIRED BY THE FOURTEENTH AMENDMENT OF THE CONSTITUTION. IT CANNOT STAND AND THE WRIT MUST ISSUE.

ACCORDINGLY, I MAKE THE FOLLOWING:

R E C O M M E N D A T I O N

NOW, THIS 3RD DAY OF NOVEMBER, 1977, IT IS RESPECTFULLY RECOMMENDED THAT RELATOR'S PETITION FOR A WRIT OF HABEAS CORPUS BE GRANTED, AND THAT THE EXECUTION OF THE WRIT BE STAYED FOR A PERIOD OF SIXTY (60) DAYS FROM THE DATE OF THE ORDER OF THE COURT TO GIVE THE COMMONWEALTH AN OPPORTUNITY TO APPEAL AS PROVIDED BY LAW, OR TO RELIST THE BILL OF INDICTMENT FOR A SPEEDY TRIAL.

/s/ EDWIN E. NAYTHONS
UNITED STATES MAGISTRATE

APPENDIX D COMMONWEALTH OF PENNSYLVANIA

V.

SULLIVAN

has not been reprinted. It can be found at 371 A.2d 468.

APPENDIX E COMMONWEALTH OF PENNSYLVANIA

V.

SULLIVAN

has not been reprinted. It can be found at 446 Pa. 419.

APPENDIX F

Opinion of the Court of Common Pleas Denying Post Conviction Relief

OPINION

DOTY, A.J.

This matter is before the court for consideration of defendant's Petition for Relief under the Post Conviction Hearing Act 19 P.S. 1180-1 et seq. Several evidentiary hearings were held at which time defendant was represented by counsel other than his trial counsel. After a careful consideration of the extensive record in this case, including the testimony taken before us, oral argument presented, briefs filed and the applicable law, we are convinced that defendant's petition must be granted in part and denied in part.

A factual background which gave rise to this case has been set forth by the Pennsylvania Supreme Court in its opinion dated December 29, 1971. Commonwealth vs. Sullivan, 446, Pa. 419 (1971).[1] Succinctly stated, the defendant was convicted following a trial before the Honorable Alexander F. Barbieri and a jury of the crime of first degree murder in the deaths of Rita Janda and John Gorey. Following the filing and denial of post trial motions by a court en banc, a direct

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[1] In view of our comments which follow, there may be some discrepancies argued by counsel concerning the factual situation, but the short summary in the prior report will suffice for the purpose of this opinion.

appeal was filed on September 6, 1968 and certiorari from the Supreme Court was filed on September 10, 1968. As stated hereinabove, this case was decided by the Pennsylvania Supreme Court on December 29, 1971. The judgment of sentence was therein affirmed by an evenly divided court, one justice taking no part in the consideration or decision of this case.

On January 10, 1972, a petition for rehearing was filed with the Pennsylvania Supreme Court and on February 22, 1972 that petition for rehearing was denied. This is the first petition filed by defendant under the Post Conviction Hearing Act.

Although motions for new trial and motions in arrest of judgment were heard before a three judge court en banc in the court below, one of defendant's two counsel, G. Fred DiBona, Esquire, was appointed a Judge of the Court of Common Pleas of Philadelphia (April, 1969) prior to further proceedings on appeal. After Mr. (now Judge) DiBona's appointment to the bench, there was considerable confusion concerning the ongoing representation of defendant. Judge DiBona testified in the evidentiary hearing before us that he did not file a brief in the Supreme Court. He stated that a rough draft of the brief had been prepared but he had no knowledge of a brief ever being filed. Nor did he have any conversation with the defendant as to the waiving of oral argument in the Supreme

COURT. A. CHARLES PERUTO, ESQUIRE, DEFENDANT'S CO-COUNSEL, TESTIFIED BEFORE US THAT JUDGE DIBONA WAS CHIEF COUNSEL IN THE CASE. HE STATED THAT THERE WAS SOME QUESTION ABOUT SUBMITTING THE CASE TO THE SUPREME COURT ON BRIEFS BUT IT WAS HIS RECOLLECTION THAT HE NEVER WROTE A BRIEF AND HE DOES NOT RECALL FILING AN APPEAL IN THE SUPREME COURT. PARENTHETICALLY, HOWEVER, WE DO NOTE THAT THE OFFICIAL SUPREME COURT REPORT OF THIS CASE DOES INDICATE MR. PERUTO'S APPEARANCE FOR THE DEFENDANT. IN ADDITION, FOOTNOTE NO. 1 ON PAGE 423, OF THE SUPREME COURT'S OPINION INDICATES THAT A BRIEF WAS FILED BY "COURT-APPOINTED COUNSEL" AS WELL AS THE APPELLANT IN PROPRIA PERSONA.

JAMES D. CRAWFORD, ESQUIRE, FORMERLY CHIEF OF THE APPEALS DIVISION OF THE DISTRICT ATTORNEY'S OFFICE TESTIFIED THAT HE HAD A CONVERSATION WITH MR. PERUTO WHO SAID HE WOULD BE INTERESTED IN SUBMITTING THE CASE ON BRIEFS, (WITHOUT ORAL ARGUMENT). MR. CRAWFORD FURTHER STATED THAT WHILE MOST DIRECT APPEALS IN FIRST DEGREE MURDER CASES HAVE ORAL ARGUMENT, MR. PERUTO TOLD HIM THAT HE WAS VERY BUSY AND THAT THE MATTER MIGHT BE SUBMITTED ON BRIEFS. HE ALSO STATED THAT MR. PERUTO'S OFFICE SENT OVER A BRIEF TO THE SUPREME COURT BUT HE DID NOT KNOW WHO ACTUALLY DELIVERED IT TO THE SUPREME COURT. IN ADDITION, DEFENDANT APPARENTLY FILED A PRO SE BRIEF ON HIS OWN, ALTHOUGH THERE IS NO TESTIMONY THAT DEFENDANT WAS EVER TRAINED

IN THE LAW. IT IS TO BE NOTED THAT MR. CRAWFORD FURTHER TESTIFIED THAT HIS BRIEF WAS NOT FILED UNTIL SEVEN MONTHS AFTER THE FILING OF THE APPEAL.

AT THE EVIDENTIARY HEARING BEFORE US, MR. PERUTO TESTIFIED THAT TO THE BEST OF HIS RECOLLECTION HE NEVER PRESENTED ANY ORAL ARGUMENT TO THE SUPREME COURT. HE FURTHER TESTIFIED THAT HE HAD ABSOLUTELY NO RECOLLECTION OF FILING A BRIEF WITH THE SUPREME COURT. ON THE CONTRARY, HE STATED THAT WHILE JUDGE DIBONA'S OFFICE MAY HAVE FINALIZED A DRAFT ON A BRIEF AND FILED IT WITH THE SUPREME COURT, HE, MR. PERUTO, WAS CERTAIN THAT HE HIMSELF NEVER FILED SUCH A BRIEF. WHEN ASKED BY DEFENDANT'S COUNSEL AT THE EVIDENTIARY HEARING THE FOLLOWING:

> Q. SO YOU NEVER FILED A BRIEF, AND I SUPPOSE YOU NEVER ORALLY ARGUED THE CASE BEFORE THE SUPREME COURT?

MR. PERUTO ANSWERED:

> A. I NEVER DID ANYTHING FOR JOHN SULLIVAN, WHICH WILL GO DOWN TO THE DAY I DIE, BECAUSE I, TOO, FELT THAT IT WAS THE WORST CASE IN MY LIFE OF AN UNFAIR CONVICTION.

DEFENDANT TESTIFIED (PAGE 232, PCHA, N.T.) THAT MR. PERUTO CAME TO SEE HIM AND SAID THAT THEY WERE GOING TO "PUT THE APPEALS IN". HE SAID, "CHUCK, DON'T FORGET, I WANT YOU TO ARGUE THIS CASE" AND MR. PERUTO REPLIED, "I DON'T FEEL THAT I SHOULD ARGUE THE CASE". HE FURTHER TESTIFIED THAT HE DID NOT CONSENT TO WAIVER OF ORAL ARGUMENT BUT THAT MR. PERUTO SAID "DON'T WORRY ABOUT IT" AND WALKED OUT.

A CAREFUL CONSIDERATION OF ALL THE TESTIMONY CONCERNING DEFENDANT'S APPELLATE RIGHTS CLEARLY INDICATES THAT ORAL ARGUMENT WAS NOT WAIVED BY DEFENDANT AND THAT THERE WAS CONSIDERABLE CONFUSION BETWEEN COUNSEL CONCERNING THE APPEAL DUE TO JUDGE DIBONA'S APPOINTMENT TO THE BENCH AND MR. PERUTO'S HEAVY TRIAL SCHEDULE. IN A MATTER INVOLVING A CONVICTION FOR FIRST DEGREE MURDER, IT IS OUR OPINION THAT DEFENDANT'S RIGHTS SHOULD HAVE BEEN FULLY PROTECTED AND EVERY POSSIBLE ARGUMENT FULLY EXPLORED. WE CANNOT SAY THAT THIS WAS DONE IN THIS CASE.

ARTICLE I, §9, OF THE PENNSYLVANIA CONSTITUTION PROVIDES THAT IN ALL CRIMINAL PROSECUTIONS THE ACCUSED HAS THE RIGHT TO BE HEARD BY HIMSELF AND HIS COUNSEL. WE TAKE THIS TO INCLUDE NOT ONLY TRIAL BUT ALSO IN THE SUBSEQUENT PROCEEDINGS. SEE, STEWART VS. COMMONWEALTH, 117 PA. 378, 381; COMMONWEALTH VS. MCNAIR, 208 PA. SUPERIOR COURT, 369 (1966).

WE ARE MINDFUL OF THE FACT THAT THE SUPREME COURT DIVIDED EVENLY IN ITS DECISION IN THIS CASE. ORAL ARGUMENT MIGHT HAVE PERSUADED A DIFFERENT DECISION. FURTHERMORE, DEFENDANT WAS ENTITLED TO A CAREFULLY PREPARED BRIEF BY HIS COUNSEL SO THAT HIS ARGUMENT COULD BE FULLY PRESENTED AND IT DOES NOT APPEAR THAT THAT WAS DONE IN THIS CASE. TO THIS EXTENT WE FIND AS A FACT THAT THERE WAS INEFFECTIVE ASSISTANCE OF COUNSEL AND THAT THIS REQUIRES GRANTING DEFENDANT RELIEF.

IN THE INSTANT PETITION DEFENDANT HAS RAISED A NUMBER OF OTHER CONTENTIONS WHICH CAN BE ARGUED ON APPEAL. HOWEVER, THERE ARE SEVERAL MATTERS WHICH DESERVE OUR FURTHER ATTENTION.

1. DEFENDANT CONTENDS THAT A SECRET MEMORANDUM WAS PRESENTED TO THE TRIAL JUDGE BY THE DISTRICT ATTORNEY AND THAT THIS MEMORANDUM WAS NOT DISCLOSED TO DEFENSE COUNSEL. JUDGE BARBIERI TESTIFIED THAT HE DID HAVE SOME RECOLLECTION OF A MEMORANDUM PRESENTED BY RICHARD A. SPRAGUE, FIRST ASSISTANT DISTRICT ATTORNEY, BUT THAT THIS MEMORANDUM HAD NO REAL BEARING ON THE CASE. THIS COMMUNICATION CONCERNED THE FINDING OF CERTAIN GUNS WHICH WERE NOT USED IN THIS CASE. IT DOES NOT APPEAR TO US THAT THIS HAD ANY EFFECT ON THE TRIAL JUDGE'S RULING AND FURTHERMORE, THE JURY WAS NOT INFORMED OF THE COMMUNICATION NOR THE CONTENTS OF IT. A CAREFUL READING OF THE RECORD INDICATES NO PREJUDICE TO THE DEFENDANT ON THIS GROUND.

2. DEFENDANT CHARGES THAT THE TRIAL JUDGE INDICATED TO HIS TRIAL COUNSEL THAT HE DID NOT THINK DEFENDANT WOULD BE FOUND GUILTY AND THAT THE TRIAL JUDGE'S RULINGS FAVORED THE COMMONWEALTH. THERE IS NOTHING IN THE RECORD TO SUBSTANTIATE SUCH A CONTENTION NOR DO THE TRIAL JUDGE'S RULINGS INDICATE THAT THIS WAS THE CASE. JUDGE BARBIERI TESTIFIED THAT HE NEVER INDICATED TO DEFENSE COUNSEL THAT HE THOUGHT DEFENDANT WOULD BE ACQUITTED. FURTHERMORE, IT MUST BE BORNE IN MIND THAT THIS WAS A JURY TRIAL AND THE JURY HAD THE ULTIMATE DECISION IN THIS CASE. ABSOLUTELY NOTHING IN THE RECORD INDICATES THAT THE JURY WAS INFLUENCED IMPROPERLY.

3. Defendant objects to the admission of color slides at trial. Admission of color slides was discussed at length by the Supreme Court in its prior opinions and if the defendant is granted re-argument it can be re-considered by the Supreme Court.

4. Alleges errors in the trial judge's charge: this is also a matter for argument before the Supreme Court.

5. Failure of the defendant to take the witness stand. Judge DiBona testified that the defendant was fully consulted concerning his right to testify and that the decision of defendant not to testify was made jointly by counsel and the client. We see no question of ineffective assistance of counsel here.

6. Sufficiency of the evidence. The defendant also contends that he is entitled to relief in these proceedings because the evidence was insufficient as a matter of law to sustain his conviction. This contention was the subject of extended discussion by the Pennsylvania Supreme Court in its prior opinion. We have heard nothing in the proceedings before us which requires Post Conviction Hearing Act Relief. If this case is re-argued in the Supreme Court there may be a full argument on the question of sufficiency of the evidence.

7. After-discovered evidence: defendant contends that he had witnesses who should have been called on his behalf. It is our opinion that defendant has failed to meet the tests required for relief on this ground. See, Commonwealth vs. Schuck, 401 Pa. 222 (1960). Defendant raises a number of other contentions in proceedings before us but all of these can be covered on re-argument in the Supreme Court.

For the above reasons, we hereby enter the following:

ORDER

AND NOW, to wit, this 6th day of November, 1974, defendant is hereby granted leave, nunc pro tunc, to re-file an appeal in the Supreme Court of Pennsylvania and to file briefs and present oral argument theron; Petition for Relief under the Post Conviction Hearing Act is otherwise denied.

/s/ Ethan Allen Doty, A.J.

Supreme Court, U. S.
FILED
NOV 21 1979
MICHAEL RODAK, JR., CLERK

APPENDIX

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1979

No. 78-1832

JULIUS T. CUYLER, SUPERINTENDENT

and

DISTRICT ATTORNEY OF PHILADELPHIA,
Petitioner

v.

JOHN SULLIVAN,
Respondent

On Writ of Certiorari to The United States Court of Appeals for the Third Circuit.

Petition for Certiorari Filed June 7, 1979.
Certiorari Granted October 1, 1979.

THE LEGAL INTELLIGENCER, 66 NORTH JUNIPER STREET, PHILA., PA. 19107 (215) 561-4050

IN THE
SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1979

NO. 78-1832

JULIUS T. CUYLER, SUPERINTENDENT

and

DISTRICT ATTORNEY OF PHILADELPHIA
Petitioner

v.

JOHN SULLIVAN
Respondent

ON WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

INDEX

	Page
Chronological List of Docket Entries, Third Circuit.	1a
Chronological List of Docket Entries, District Court	4a
Chronological List of Docket Entries, Court of Common Pleas.	6a

INDEX

Page

Excerpts from Testimony at State Court Hearing:

G. Fred DiBona, Esquire (April 24, 1974) [pages 6-7; 10-25; 29-30; 36-42; 55-57]. 9a

A. Charles Peruto, Esquire (April 24, 1974) [pages 85-110; 117-130]. 40a

John Sullivan (April 25, 1974) [pages 140-235]. 81a

G. Fred DiBona, Esquire (May 15, 1974) [pages 4-16] 178a

Gregory Carchidi (August 6, 1974) [pages 78-85]. 192a

A. Charles Peruto, Esquire (August 8, 1974) [pages 101-102]. 201a

Excerpts from Testimony of Gregory Carchidi at Medical Examiner's Inquest (November 3, 1966) [pages 47-49; 92-93] 204a

Excerpts from Transcript of Trial (In-Chambers Discussion) (June 12 and 13, 1967) [pages 481; 621-644; 647-674]. 210a

Excerpt from Transcript of Trial in Commonwealth v. John Sullivan (June 16, 1967) [pages 1127-1128]. 263a

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The Opinions filed by the Third Circuit, the District Court, the Pennsylvania Supreme Court, and the Philadelphia Court of Common Pleas in this proceeding are reproduced in full in the Appendix to the Petition for Certiorari.

DOCKET ENTRIES - THIRD CIRCUIT

DOCKET ENTRIES

IN THE

UNITED STATES COURT OF APPEALS

FOR THE THIRD CIRCUIT

APPEAL FROM THE EASTERN DISTRICT OF PENNSYLVANIA

CASE No. 78-1411

SULLIVAN, JOHN,

APPELLANT

V.

CUYLER, JULIUS T., SUPERINTENDENT,
GRATERFORD STATE CORRECTIONAL INSTITUTION

AND

DISTRICT ATTORNEY OF PHILADELPHIA COUNTY

DATE	FILINGS--PROCEEDINGS
1978	
APRIL 10	(FORMA PAUPERIS IN D. C. -- SEE COPY OF ORDER DATED JULY 25, 2977 (JOHN MORGAN DAVIS, U.S.D.J.) GRANTING JOHN SULLIVAN, APPELLANT, LEAVE TO PROCEED IN FORMA PAUPERIS). (SEE COPY OF ORDER DATED FEBRUARY 2, 1978 (JOHN MORGAN DAVIS, U.S.D.J.) STATING THERE EXISTS PROBABLE CAUSE FOR APPEAL, ATTACHED TO COPY OF NOTICE OF APPEAL). COPY OF NOTICE OF APPEAL, RECEIVED MARCH 3, 1978, FILED. RECORD, RECEIVED MARCH 21, 1978, FILED.

CASE No. 78-1411

DATE	FILINGS--PROCEEDINGS
1978	
MAY 3	FIRST SUPPLEMENTAL RECORD (STATE COURT RECORD), FILED. STATE COURT RECORD IN EXHIBIT ROOM (1 BOX).
MAY 10	CONSENT MOTION BY APPELLANT FOR LEAVE TO EXTEND TIME FOR FILING BRIEF AND APPENDIX TO 30 DAYS (TO JUNE 19, 1978), FILED. (4 CC.). CERTIFICATE OF SERVICE ATTACHED.
MAY 12	ABOVE CONSENT MOTION GRANTED. NO FURTHER EXTENSIONS. CLERK.
JUNE 19	APPEARANCE OF MARILYN J. GELB, ESQ. FOR APPELLANT, FILED.
JUNE 19	BRIEF FOR APPELLANT, FILED. (4 CC.), CERTIFICATE OF SERVICE BY MAIL ON JUNE 19, 1978 APPEARS ON LAST PAGE OF BRIEF.
JUNE 19	APPENDIX, FILED. (4 CC.), CERTIFICATE OF SERVICE BY MAIL ON JUNE 19, 1978 APPEARS ON LAST PAGE OF APPENDIX.
JULY 5	APPEARANCE OF MICHAEL F. HENRY, FOR APPELLEE, COMMONWEALTH OF PA. (DISTRICT ATTORNEY OF PHILA. COUNTY), FILED.
JULY 5	CONSENT MOTION BY APPELLEE FOR LEAVE TO EXTEND TIME FOR FILING APPELLEE'S BRIEF TO 30 DAYS FROM JULY 19, 1978 (OR TO AUGUST 18, 1978), FILED. (1 CC). SERVICE IN LETTER OF JULY 5, 1978.
JULY 10	ABOVE CONSENT MOTION GRANTED. CLERK. NO FURTHER EXTENSIONS.
AUG. 17	BRIEF FOR APPELLEE, FILED. SERVICE BY HAND DELIVERY ATTACHED.
OCT. 5	COPIES OF 40 SLIDES, RECEIVED FOR THE INFORMATION OF THE COURT. (IN COURT OF APPEALS SAFE)
NOV. 6	ORDER DATED NOVEMBER 3, 1978 (ALDISERT, C.J.) DIRECTING 20 MINUTES ARGUMENT TIME FOR EAC (SIC) SIDE, FILED.
NOV. 16	ARGUED. CORAM: ALDISERT AND HUNTER, C.J. AND GERRY, D.J.
1979	
FEB. 14	OPINION OF THE COURT (ALDISERT AND HUNTER, C.J. AND GERRY, D.J.*), FILED. * HONORABLE JOHN F. GERRY, OF THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF NEW JERSEY, SITTING BY DESIGNATION.
FEB. 14	JUDGMENT REVERSING THE ORDER OF THE DISTRICT COURT, FILED FEBRUARY 6, 1978, AND REMANDING THE CAUSE WITH DIRECTION THAT THE WRIT OF HABEAS CORPUS SHALL ISSUE DISCHARGING PETITION FROM STATE CUSTODY UNLESS WITHIN A REASONABLE TIME FIXED BY THE DISTRICT COURT PETITIONER IS AFFORDED A NEW TRIAL; WITH COSTS TAXED IN FAVOR OF APPELLANT, FILED.

CASE No. 78-1411

DATE	FILINGS--PROCEEDINGS
1979	
FEB. 27	PETITION FOR REHEARING IN BANC BY APPELLEE, FILED. SERVICE ATTACHED.
MAR. 13	MOTION BY APPELLANT TO SET BAIL IN A REASONABLE AMOUNT PENDING ISSUANCE OF MANDATE IN THIS COURT, FILED. (4CC) SERVICE ATTACHED.
MAR. 14	ANSWER BY APPELLEES TO APPELLANT'S MOTION FOR BAIL PENDING ISSUANCE OF MANDATE, FILED. (5CC) SERVICE ATTACHED.
MAR. 14	PETITION BY APPELLEE TO STAY ISSUANCE OF MANDATE PENDING UNITED STATES SUPREME COURT REVIEW, FILED. (4CC) SERVICE ATTACHED.
MAR. 15	ORDER (ALDISERT, C.J.) STAYING THE ISSUANCE OF THE MANDATE UNTIL JUNE 11, 1979, FILED.
MAR. 12	ORDER (SEITZ, CH.J., ALDISERT, ADAMS, GIBBONS, ROSENN, HUNTER, WEIS, GARTH AND HIGGINBOTHAM, C.J.) DENYING APPELLEE'S PETITION FOR REHEARING TOGETHER WITH SEPARATE DISSENTING STATEMENT BY JUDGE GARTH WITH WHOM JUDGES ADAMS AND ROSENN JOIN, FILED.
MAR. 16	ORDER (ALDISERT AND HUNTER, C.J. AND GERRY, D.J.) DENYING APPELLANT'S APPLICATION FOR BAIL, THERE BEING NO RECORD THAT AN APPLICATION WAS PRESENTED TO THE STATE COURT IN THE FIRST INSTANCE, AND THEN REFUSED FOR REASONS STATED, AND THERE ALSO BEING NO RECORD THAT AN APPLICATION FOR HABEAS CORPUS WAS PRESENTED IN THE DISTRICT COURT FOR THE REASON THAT BAIL WAS DENIED BY THE STATE COURT SYSTEM, FILED.
MAR. 16	CERTIFIED COPY OF ABOVE ORDER TO CLERK OF D.C.
JUNE 11	NOTICE OF FILING ON JUNE 7, 1979 OF PETITION FOR WRIT OF CERTIORARI, RECEIVED FROM CLERK OF SUPREME COURT, FILED. (S.C. No. 78-1832)
OCT. 3	CERTIFIED COPY OF ORDER DATED OCTOBER 1, 1979 GRANTING PETITION FOR WRIT OF CERTIORARI RECEIVED FROM CLERK OF SUPREME COURT, FILED. (S.C. No. 78-1832).

DOCKET ENTRIES - DISTRICT COURT

DOCKET ENTRIES

IN THE

UNITED STATES DISTRICT COURT FOR

THE EASTERN DISTRICT OF PENNSYLVANIA

SULLIVAN, JOHN vs CUYLER, JULIUS T., SUPERINTENDENT, GRATERFORD STATE CORRECTIONAL INSTITUTION

AND

DISTRICT ATTORNEY OF PHILADELPHIA COUNTY

DATE	PROCEEDINGS
1977	
1 JUL	RELATOR'S PETITION FOR WRIT OF HABEAS CORPUS, WITH OATH OF POVERTY AND MEMORANDUM IN SUPPORT THEREOF, FILED.
2 "	ORDER GRANTING PETITION LEAVE TO PROCEED IN FORMA PAUPERIS INCLUDING FILING OF A NOTICE OF APPEAL, FILED. 7/25/77 ENTERED AND COPIES MAILED.
"	REFERRED TO JUDGE MAYTHONS
3 JUL	ORDER THAT DISTRICT ATTORNEY OF PHILA. COUNTY IS ADDED AS A PTY. RESPONDENT AND CAPTION IS SO AMENDED; SPECIFIC AND DETAILED ANSWERS SHALL BE FILED WITHIN 20 DAYS TOGETHER WITH A MEMORANDUM OF LAW; CLERK OF QUARTER SESSION COURT SHALL FORWARD THE COMPLETE STATE COURT RECORD IN TEN(10) DAYS, FILED. 7/27/77 ENTERED AND COPIES MAILED
4 AUG	ANSWER OF DISTRICT ATTORNEY OF PHILA. COUNTY TO RELATOR'S PETITION FOR WRIT OF HABEAS CORPUS, FILED.
-- SEPT	STATE COURT RECORD RECEIVED AND FORWARDED TO COURT ROOM DEPUTY TO JUDGE DAVIS.
1978	
5 FEB	REPORT-RECOMMENDATION, MAYTHONS, J. THAT PETITION FOR WRIT OF HABEAS CORPUS BE GRANTED, ETC., FILED.
6 "	MEMORANDUM, DAVIS, J. AND ORDER AND REPORT IS APPROVED AND ADOPTED INSOFAR AS IT IS NOT IN CONFLICT WITH THE OPINION OF THE COURT; RECOMMENDATION IS REJECTED; PETITION FOR WRIT OF HABEAS CORPUS IS DENIED; THERE EXISTS PROBABLE CAUSE FOR APPEAL, FILED. 2/6/78 ENTERED AND COPIES MAILED TOGETHER WITH REPORT-RECOMMENDATION

DISTRICT COURT DOCKET ENTRIES

7 MAR	RELATOR'S NOTICE OF APPEAL RECEIVED 4:00 P.M. 3/1/78, FILED. 3/2/78 ENTERED AND COPIES MAILED...U.S.C.A. AND H. SENDROW, ESQ.
8 "	COPY OF CLERK'S NOTICE OF APPEAL TO US COURT OF APPEALS, FILED. 3/2/78 ENTERED AND COPIES MAILED... U.S.C.A. AND DAVIS, J.

I, JOHN J. HARDING, ESQ.

NONE.

3/21/78

DOCKET ENTRIES - COURT OF COMMON PLEAS

DOCKET ENTRIES

IN THE COURT OF COMMON PLEAS

TRIAL DIVISION - CRIMINAL SECTION

COUNTY OF PHILADELPHIA

COMMONWEALTH	:	1966 NOVEMBER
VS.	:	190 - MURDER
JOHN SULLIVAN	:	193 - MURDER

MAY 22, 1967 - COURT ROOM 653
PRESIDING HON. ALEXANDER BARBIERI
DEFENDANT PRESENT WITH HIS COUNSEL.
UPON BEING ARRAIGNED STANDS MUTE.

THE COURT ORDERS A PLEA OF NOT GUILTY TO BE ENTERED AS TO BOTH BILLS, ON BEHALF OF DEFENDANT.

A JURY BEING DULY EMPANELLED, SWORN AND AFFIRMED, THE TRIAL PROCEEDS:

JUNE 19, 1967 - VERDICT:
190 - GUILTY OF MURDER FIRST DEGREE
193 - GUILTY OF MURDER FIRST DEGREE

AFTER FURTHER DELIBERATION, THE JURY FIXED THE PENALTY AT LIFE IMPRISONMENT.

SENTENCE DEFERRED PENDING FILING OF POST TRIAL MOTIONS.

BARBIERI, J.

JUNE 21, 1967 - MOTION FOR NEW TRIAL AND IN ARREST OF JUDGMENT FILED.

OCT. 19, 1967 - ORDER NAMING A COURT EN BANC FILED.

CARROLL, J.

COURT OF COMMON PLEAS DOCKET ENTRIES

JAN. 30, 1968 - ORDER FOR RE-ARGUMENT OF MOTIONS FILED.

BARGIERI, J.

JULY 15, 1968 - ORDER: AFTER ARGUEMENT AND RE-ARGUEMENT BEFORE THE COURT EN BANC - MOTION IN ARREST OF JUDGMENT -- DENIED.
MOTION FOR NEW TRIAL - DENIED.

HON. ALEXANDER BARBIERI
HON. STANLEY GREENBERG

JUDGE EDWARD BRADLEY DISSENTS THE DENIAL OF MOTION FOR NEW TRIAL.

AUG. 9, 1968 - AND NOW SENTENCE:
190 - TO THE STATE CORRECTIONAL INSTITUTION FOR THE REMAINDER OF HIS NATURAL LIFE FROM 11-3-66.

193 - TO THE STATE CORRECTIONAL INSTITUTION FOR THE REMAINDER OF HIS NATURAL LIFE. TO RUN CONSECUTIVE TO SENTENCE ON BILL 190 NOV 1966.

BARBIERI, J.

EO DIE:
WRIT OF CORAM NOBIS FILED.

SEPT. 10, 1968 - CERTIORARI FROM THE SUPREME COURT FILED, RETURNABLE THE 2ND MONDAY OF OCTOBER 1968.

OCT. 3, 1968 - WRIT OF CORAM NOBIS DISMISSED.

OPINION FILED.

BARBIERI, J.
GREENBERG, J.

OCT. 4, 1968 - OPINION FILED.

BARBIERI, J.
GREENBERG, J.
BRADLEY, J.

DEC. 29, 1971 - JUDGMENT OF SENTENCE AFFIRMED BY THE SUPREME COURT OF PENNSYLVANIA.

OPINION FILED.

JUSTICE POMEROY

DISSENTING OPINION FILED. - JUSTICE ROBERTS

JAN. 10, 1972 - PETITION FOR REHEARING BEFORE SUPREME COURT FILED.

COURT OF COMMON PLEAS DOCKET ENTRIES

FEB. 22, 1972 - PETITION FOR REHEARING DENIED BY SUPREME COURT.

FEB. 23, 1972 - REMITTITUR - JUDGMENT OF SENTENCE AFFIRMED BY THE SUPREME COURT OF PENNSYLVANIA

OCT. 30, 1973 - PETITION FOR POST CONVICTION RELIEF HEARING FILED.

- COMMONWEALTH'S ANSWER TO PETITION FILED.

JAN. 4, 1974 - ORDER: DEFENDANT GRANTED LEAVE TO FILE AN AMENDED PETITION POST CONVICTION. IF PETITION IS NOT FILED WITHIN 10 DAYS - PETITION IS DISMISSED.
BARBIERI, J.

FEB. 14, 1974 - ORDER: PETITIONER IS GRANTED LEAVE TO FILE AN AMENDED PETITION FOR POST CONVICTION RELIEF HEARING - ON OR BEFORE FEB. 15, 1974.
BARBIERI, J.

FEB. 27, 1974 - ORDER: COMMONWEALTH GRANTED A PERIOD OF 20 DAYS FROM THE FILING OF THE AMENDED PETITION, BY THE PETITIONER, TO REPLY THERETO.
BARBIERI, J.

APRIL 4, 1974 - AMENDED PETITION FOR POST CONVICTION HEARING FILED.

- COMMONWEALTH'S ANSWER TO AMENDED PETITION FILED.

NOV. 6, 1974 - AND NOW TO WIT: DEFENDANT IS HEREBY GRANTED LEAVE TO FILE NUNC PRO TUNC APPEAL TO THE SUPREME COURT OF PENNSYLVANIA AND TO FILE BRIEFS AND PRESENT ORAL ARGUEMENT THEREON.

PETITION FOR RELIEF UNDER THE POST CONVICTION HEARING ACT IS OTHERWISE DENIED.

DOTY, A.J.

EO DIE: OPINION FILED.
DOTY, A.J.

NOV. 18, 1974 - CERTIORARI FROM SUPREME COURT FILED. RETURNABLE FORTHWITH.
(DISTRICT ATTORNEY)

NOV. 22, 1974 - 2 CERTIORARIES FROM SUPREME COURT FILED RETURNABLE FORTHWITH.
(DEFENDANTS COUNSEL)

EXCERPTS FROM TESTIMONY OF G. FRED DIBONA, ESQUIRE
APRIL 24, 1974

IN THE COURT OF COMMON PLEAS

FIRST JUDICIAL DISTRICT OF PENNSYLVANIA

CRIMINAL TRIALS DIVISION

COMMONWEALTH	:	NOVEMBER TERM, 1966
V.	:	
JOHN SULLIVAN,	:	NUMBERS 190 and 193
Defendant		

POST CONVICTION HEARING ACT PETITION

Room 784, City Hall
Philadelphia, Pennsylvania

April 24, 1974 and
April 25, 1974

BEFORE: HONORABLE ETHAN ALLEN DOTY, A.J.

PRESENT:

KARL LUNKENHEIMER, ESQUIRE
ASSISTANT DISTRICT ATTORNEY
FOR THE COMMONWEALTH

(MS.) MARILYN GELB, ESQUIRE and
JAMES M. MORAN, ESQUIRE
ATTORNEYS FOR THE DEFENDANT

****

DIRECT EXAMINATION

BY MR. MORAN:

Q Judge DiBona, was there a time when you represented the defendant, John Sullivan?

A Yes, there was, together with Chuck Peruto.

Q Co-counsel was Chuck Peruto?

A Yes.

Q And Mr. Sullivan's case was tried and he

was found guilty; is that correct?

A That's correct.

****

****

Q There came a time during the course of the trial where the trial Judge decided to let the case go to the jury?

A Yes, sir.

Q And thereafter did you discuss with Mr. Sullivan and with Mr. Peruto whether or not you would present any evidence, specifically whether or not you would put Mr. Sullivan on the stand and whether or not you would put other witnesses on the stand?

A Yes, sir, we did have a long discussion.

Q Would you tell me about how long that discussion took?

A I would say the discussion as to whether Sullivan should testify or not took an hour and a half to two hours up in the cell room.

Q Is it correct in the beginning Mr. Sullivan wanted to testify in his own behalf?

A No, sir, that's not my recollection.

Q Did you want him to testify?

A Well, we had a lengthy discussion, as I say. Mr. Sullivan did not want to testify in his own behalf. I was of the opinion he should. Mr. Peruto was being the Devil's Advocate on both sides of it. Ultimately John Sullivan discussed the matter with his brother and other members of the family and made his decision that he would not testify.

THE COURT: You thought he should?

THE WITNESS: I thought he should, yes, sir.

BY MR. MORAN:

Q And you recommended that he should?

A Yes, sir. Very strongly.

Q Your Honor, there were times during the course of the trial that you made certain objections to certain evidence that was being introduced by the District Attorney. You had some discussions with the trial Judge, Judge Barbieri. Do you remember, sir, Judge Barbieri off the record making certain remarks to you to the extent that he was permitting the evidence in because he was convinced that the man would be acquitted?

MR. LUNKENHEIMER: Objection,

your Honor. I don't think that that type of testimony is relevant considering this case was tried by a jury and conviction found and an appeal was taken and the verdict was sustained on the sufficiency of the evidence.

THE COURT: I think, Mr. Moran you'll have to have more of a foundation for this type of testimony before you can proceed. I'll sustain the objection now without prejudice to your right to raise the question later if it becomes material.

MR. MORAN: Well, let me put it in another way, if the Court will permit.

BY MR. MORAN:

Q Did you convey to Mr. Sullivan during the course of the conversation when you were attempting to decide whether or not he would take the stand that Judge Barbieri had told you on numerous occasions off the record that there was insufficient evidence to sustain a conviction?

A I did, sir.

MR. LUNKENHEIMER: Objection, your Honor.

THE COURT: That I'll overrule.

BY MR. MORAN:

Q And you did tell Mr. Sullivan that during your conversation with him as to whether a case should be presented?

A Yes, sir, I did.

Q And you were convinced at that time that there was insufficient evidence; is that correct, sir?

A I was convinced in the very beginning of the case there was no evidence of any kind, character or description from which he could be convicted.

Q And you were convinced that Judge Barbieri felt that way himself?

MR. LUNKENHEIMER: Objection, your Honor. He's calling for Judge DiBona to show the state of mind of Judge Barbieri.

THE COURT: I'll sustain the objection.

BY MR. MORAN:

Q Would you tell us what Judge Barbieri said to you with respect to that?

MR. LUNKENHEIMER: Objection. Judge Barbieri is as available as Judge DiBona.

THE COURT: I'll sustain that. You may ask the witness what he told the

defendant. That you can ask.

BY MR. MORAN:

Q Would you be more specific with respect to what you told the defendant, sir?

A Yes, sir. From the very outset of the trial of this case we had 30 or 40 conferences on rulings on evidence, and the like, and in each and every one of them we were overruled, the defense was, although on almost every one of them Judge Barbieri said we were undoubtedly right.

MR. LUNKENHEIMER: Objection, your Honor. It's again the hearsay statement that I objected to before.

THE COURT: No, we're getting to what he told the defendant. So I'll overrule that. Proceed.

THE WITNESS: Judge Barbieri said on at least 20 occasions during the course of this trial, "Fred," as he called me during that period, "there is no doubt in my mind the defendant will be acquitted. We might just as well give the District Attorney his full rope and let him try the case to his heart's content, let everything in, and he'll be acquitted in any event."

He said that at least 20 times during the course of the trial.

BY MR. MORAN:

Q In the beginning, sir, did you come to the conclusion that Judge Barbieri --

THE COURT: Now you told this to the defendant?

THE WITNESS: Yes, I told Mr. Sullivan. That's right, sir.

BY MR. MORAN:

Q And after these conversations with Judge Barbieri, sir, did you come to the conclusion that he was not going to let the case go to the jury?

MR. LUNKENHEIMER: Objection, your Honor.

THE COURT: Well, again I'll sustain that. We are only concerned at this point, Mr. Moran, with what he told the defendant.

MR. MORAN: If your Honor please --

THE COURT: Now after you've got a proper foundation here you can ask the question like this. But at this point there is no foundation for it.

MR. MORAN: Well, may I make an offer of proof, sir?

THE COURT: All right.

MR. MORAN: Judge DiBona made a tactical decision with respect to whether or not to present testimony or not in this particular case.

THE COURT: Well, we haven't got to that point yet.

MR. MORAN: That's why I'm giving you an offer of proof, sir. Maybe we'll save a little time with these objections.

THE COURT: All right.

MR. MORAN: Part of the reason why Judge DiBona made this decision was made upon the statements made to him by Judge Barbieri. Since it's obvious that Judge DiBona's decision with respect to this tactical move was based on that, we must know his motives, why he did it.

THE COURT: Well, first, before you get to that point, you have to get into the record what was done. In other words, you're saying that your offer is

to include counsel for the defense's decision not to present testimony. Now, first, you have to determine what testimony was not presented and then you go to the reason for it.

MR. MORAN: I thought we just established, sir, that there was no testimony presented. Judge DiBona just testified to it.

THE COURT: Well, you have to say that. We don't know that there was no testimony. We know that the defendant said that he didn't want to testify. The defendant said that but not as to other testimony.

MR. LUNKENHEIMER: Your Honor, I would further object in light of the fact that the case law in this Commonwealth indicates that the Supreme Court of this State will not review with hindsight the tactical decisions —

THE COURT: Oh, I know Washington v. Maroney. If you're objecting to his offer of proof I'll overrule it, again permitting you to argue at the conclusion

of the case.

MR. LUNKENHEIMER: Yes, your Honor.

BY MR.MORAN:

Q Was there any testimony at all offered in the defense for John Sullivan?

A No, sir, there was not.

Q Getting back to Judge Barbieri --

THE COURT: Now you can ask him, if you wish to, why there was no testimony offered.

BY MR. MORAN:

Q Why, sir?

A Well, at that point, first of all, the case was going to the jury. No doubt about that. And I don't know that Judge Barbieri indicated otherwise. His indications were that he was going to send it to the jury and the jury was going to find him not guilty. He was convinced in his own mind that the evidence was insufficient to convict, and so stated.

MR. LUNKENHEIMER: Your Honor, I would move to strike that unless that was in some way related to the defendant directly and we're speaking about a specific conversation.

THE COURT: Well, I'll overrule your objection because he's given the reasons.

THE WITNESS: I'm talking about the discussions I had with my client.

THE COURT: Proceed.

THE WITNESS: Judge Barbieri was convinced that the evidence, and so stated, made it very clear and was convinced the evidence was insufficient to warrant a conviction and felt the jury would acquit. However, when the case was going to the jury despite that feeling that had been conveyed to me by Judge Barbieri, we had a discussion as to whether we should put on a defense or not. As I said earlier, it was my opinion that John Sullivan should testify and explain his presence in the building, which was really the only evidence the Commonwealth had, the only legal evidence or legally competent evidence that they had. This was a situation where I felt that a man was being convicted just because he happened to be in a building at the wrong time. And that was the only evidence they

had. However, once John Sullivan decided he would not testify there was no other real good evidence that we had, that I thought should be offered.

BY MR. MORAN:

Q All right. Now would you say that the chief witness for the Commonwealth was a man by the name of McGrath?

A Yes, sir.

Q And he made certain statements attributed to another so-called defendant that was admitted against John Sullivan; is that correct?

A That's correct, sir.

Q And when you made or when the decision was made that there would be no evidence presented, were you aware that there was a witness, a man by the name of Hessian, who could have testified that the Commonwealth's chief witness, McGrath, had told him a different story with respect to what happened that night?

A Yes, sir, there was evidence of that. And we discussed with Mr. Hessian at that time, Mr. Peruto and I did, during the course of the trial his being a witness. We concluded that he would be of no value to us as a witness. He either left the Union at that time

or was about to leave the Union. He had some problems up there and he was afraid for his own life, as he said to us, and that he didn't want to get involved. And based on that we made a tactical decision that there'd be no sense calling him.

Q Did you subpoena him?

A We had talked to him. I don't know whether we actually issued a subpoena, a formal subpoena or not.

Q There again, when you made the decision not to call Mr. Hessian, was that decision also based upon the allegations made to you by Judge Barbieri with respect to his opinion concerning the sufficiency of the evidence against this defendant?

A No, sir, it was not. By that stage of the game, Mr. Moran, and I'm saying this about a fellow Judge, I had lost faith in Judge Barbieri as a trial Judge in that case. I kept telling Judge Barbieri, and I discussed this with John, "Judge Barbieri, you keep telling me, 'Well, let's give Dick Sprague his full road, you'll be acquitted.'" And I know at least six, seven occasions I said, "Judge Barbieri, you keep letting this nonsense in on the theory he's going to be acquitted and pretty soon you're going to have enough nonsense here so you're ruining a man's life."

There were a lot of decisions that were discretionary. The color slides, which were an important part of the Commonwealth's case, which I think were the worst slides I've ever seen, I think they had absolutely no relevancy in this case. And the Supreme Court in a three-to-three decision sustained it. The abuse of discretion was exercised on the theory that he might offend Mr. Sprague --

MR. LUNKENHEIMER: Objection. I doubt whether Judge DiBona can tell what was in Judge Barbieri's mind.

THE WITNESS: I know what was in his mind. He told me.

MR. LUNKENHEIMER: You didn't testify as to that.

THE WITNESS: He told me point blank that he thought the slides were improper but that Dick Sprague wanted them, so we'll let them in.

BY MR. MORAN:

Q As a matter of fact, sir, didn't Judge Barbieri say he wished he could keep the slides out?

A I don't recall specifically him saying that, no.

Q Now, sir, is it your opinion then, sir,

that Judge Barbieri let a lot of this testimony in not because he thought it was relevant or material but because in his opinion there was insufficient evidence to sustain a conviction?

MR. LUNKENHEIMER: Objection to the question as phrased. He's asking only for the Judge's opinion as to what Judge Barbieri did, and that is not proper.

MR. MORAN: I didn't ask that, sir. I didn't ask him his opinion as to what Judge Barbieri did. I asked him what his opinion was of the decision made by Judge Barbieri.

MR. LUNKENHEIMER: And his opinion is not relevant --

THE COURT: Well, I think that's objectionable. I'll sustain that.

BY MR. MORAN:

Q One of the other defendants in this case was a man by the name of Carchidi. At the time of the Sullivan trial did you represent Carchidi, the co-defendant?

A Yes, I did.

Q And Carchidi was eventually tried, was he not?

A Yes, sir.

Q Did you try his case?

A Mr. Peruto and I were co-counsel in that case In that case he was acquitted.

Q Did Mr. Hessian testify in that case?

A No, sir, I don't recall him testifying. I have no recollection of it.

Q You don't remember?

A No.

Q Now did you become aware some time during the Sullivan trial that a Detective McGill -- I think his nickname was Smokey, Smokey McGill -- had some notes that he had made after an interview with McGrath that contradicted McGrath, who was the Commonwealth's chief witness?

A I have a recollection of that, yes, sir.

Q And were you aware of a Detective McGowan, who also had some information that contradicted McGrath?

A I heard that, yes, sir.

Q And were you aware of a Detective Duffy who had some evidence that contradicted McGrath?

A Well, was I aware that he had some evidence or was I aware that there was a story around he had some evidence?

Q Either one.

A The latter, yes.

Q Did you ever make an effort to locate the so-called statements taken by McGill -- McGrath. Excuse me -- McGill, McGowan and Duffy which purportedly contradicted McGrath?

A As I say, Mr. Moran, I have not reviewed this record some six or seven years. Six years. I have a recollection we did attempt to get some information with respect to that, and my recollection is that we were unable to.

****

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Q Getting back to Officer McGill for the moment, sir, was it during the course of the trial that you received certain information that McGill may have

information that contradicted McGrath?

A I can't recall specifically. I think it was during the trial. But at what portion of the trial or where it was in the trial, I don't recall.

Q Do you remember, sir, if you ever asked Mr. Sprague, the District Attorney, to produce that so-called evidence that you had heard about?

A I'm sure we did. I don't recall specifically, but I'm sure we did.

Q Did Mr. Sprague ever produce that, sir?

A No, sir.

Q Do you know if that evidence was produced in the Carchidi case?

A I don't recall specifically. No, sir.

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And, your Honor, I have another fact that I forgot to mention in my discussion with Sullivan as to whether or not he should take the witness stand or not.

THE COURT: Well, I'll ask you. Was there anything else that you discussed with Mr. Sullivan with reference to his taking the witness stand?

THE WITNESS: Yes, sir. I wanted him to take the witness stand for one very important reason. The only problem, as I said earlier, the only evidence that they had was the fact that John Sullivan was in the building that night when these murders were in fact committed. And I thought his explanation of why he was there would be very forceful. He was there, he made a phone call, a long

distance phone call and had made it on a collect basis, person to person. And I thought that would be very strong for a jury: A man about to commit two murders would not pick up the phone and say to the operator I'm John Sullivan, please get me person to person so-and-so. That's just inconsistent with reasonable conduct. You know, you don't make a phone call and give your name two minutes before you're going to commit a double murder. And I thought he should take the witness stand for that very purpose.

THE COURT: Did you tell him that?

THE WITNESS: Yes, sir.

BY MR. MORAN:

Q Judge DiBona, you said that you represented one of the co-defendants in this matter along with Mr. Sullivan. Did you also represent a third defendant?

A Yes, sir.

Q So you represented all three?

A All three of them.

Q And both you and Mr. Peruto represented all three?

A Yes, sir. We were associate counsel in all three cases.

Q And did you know, Your Honor, that there was a witness by the name of Tony Salvatori who alleged that he called the deceased, Rita Janda, that he had called the deceased at 7:40 P.M. on the night when she was killed, and the Commonwealth's evidence was that she was killed at 7:15?

A I remember some such story. But there was no merit to it in any event.

Q No merit to what?

A To that witness's recollection. I think there is one thing clear, that the two people were called around 7:15. If my recollection is that that was clear; that the killings occurred before this witness allegedly spoke to Miss Janda.

Q Did you personally speak to this witness?

A I don't recall, sir.

Q Well, wasn't one of the serious issues in this case, sir, the time of death?

A Yes, sir.

Q Didn't the Medical Examiner contradict himself when he said on two occasions the time of death was on two different times?

A I don't recall specifically. There was

some discussion of the time of death.

Q Are you saying now that you're convinced it was 7:15?

A My feeling was that the deaths occurred at a time when John Sullivan was in the building.

Q Well, do you remember?

A Carchidi and McGrath were also in the building at the time the shootings occurred. There were gunshots heard. And my recollection now it was 7:15. As I said, I mean I've not seen this record for about six or seven years.

Q Well, see if I can refresh your recollection.

A I did not know I was to testify, Mr. Moran, until -- was it yesterday morning you so advised me?

Q Well, I think I first spoke to you earlier in the week, sir.

A Tuesday, maybe. Well, today is Wednesday. It's either Monday or yesterday.

Q I know that. That's why I'm going to attempt to refresh your recollection. The Medical Examiner filed the report and he said in his opinion that death occurred some time between 9:00 P.M. and 3:00 A.M. in the morning.

A Yes, sir. Give or take an hour or so.

Q And then at the trial he was asked by the

District Attorney if it could be as early as 7:15 rather than nine. Do you remember that?

A Yes, sir.

Q And you cross-examined him extensively on that. Do you remember, sir?

A Yes, sir.

Q And you said that you're contradicting yourself. Do you remember that?

A Yes, sir.

Q Well, now, wouldn't that lead you to believe there was some confusion about the time of death in this case?

A Not that alone, no. The fact that I cross-examined him to attack his credibility does not indicate my belief one way or another. I owe a responsibility to my client to make a witness look inaccurate no matter what I think the accurate situation is.

Q All right. If the Medical Examiner said in his report that in his opinion death occurred between 9:00 P.M. and 3:00 A.M. and then later changed it to, say, it could have been as early as 7:15, what makes you so convinced that it was 7:15? Isn't that a discrepancy, sir?

MR. LUNKENHEIMER: Your Honor,

I'm going to object to the line of questioning. There is no relevance to --

THE COURT: All right, I'll sustain that.

MR. MORAN: What was that, there is no relevance?

THE COURT: I have sustained the objection.

BY MR. MORAN:

Q At the time of the Sullivan trial, sir, did you have any evidence that at the time of the killing of these two people there was money taken?

A There was no evidence of that, sir.

Q No evidence of that?

A No, no suggestion of that.

Q Were you aware that there was some indication in the Carchidi trial that money was taken?

A I have no recollection of that, sir.

THE COURT: Do you mean money taken by whom, by the defendants, you mean, or by someone else?

MR. MORAN: By whoever killed these people.

THE WITNESS: I have no recollection of that. This was not tried

on the basis of a Felony Murder. I don't think there was any evidence of a Felony except the actual killing. In the Carchidi trial I'm sure that was not an issue.

MR. MORAN: I have no further questions.

THE COURT: Mr. Lunkenheimer.

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THE COURT: Well, let's get on with the testimony.

MR. LUNKENHEIMER: The Commonwealth has no further questions, your Honor.

THE COURT: I'll ask one or two questions.

Were you prepared to try this case?

THE WITNESS: Yes, sir.

THE COURT: And did you consult with the defendant on each step of the proceedings?

THE WITNESS: Yes, sir. My consultation with the defendant was not difficult. It was with the trial Judge I had my problems with. We consulted with him during trial, we were allowed to meet with him in the cell room after trial and before trial, and during lunch. Yes, sir, we had full consultation with our client at all times.

MR. LUNKENHEIMER: If I may, your Honor.

BY MR. LUNKENHEIMER:

Q In your opinion, was there any conflict between your defense of this defendant and the other two defendants who were tried at subsequent dates?

MR. MORAN: I object to that, your Honor.

THE COURT: I'll overrule that.

THE WITNESS: I saw no conflict.

BY MR. LUNKENHEIMER:

Q In terms of the timing of the presentation of this case to the Supreme Court, was the delay due to any fault on the part of yourself or Mr. Peruto?

A Without reviewing the record I would not be able to answer that, in all honesty.

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EXCERPTS FROM TESTIMONY OF A. CHARLES PERUTO, ESQUIRE
APRIL 24, 1974

IN THE COURT OF COMMON PLEAS

FIRST JUDICIAL DISTRICT OF PENNSYLVANIA

CRIMINAL TRIALS DIVISION

COMMONWEALTH	:	NOVEMBER TERM, 1966
V.	:	
JOHN SULLIVAN, Defendant	:	NUMBERS 190 and 193

POST CONVICTION HEARING ACT PETITION

Room 784, City Hall
Philadelphia, Pennsylvania

April 24, 1974 and
April 25, 1974

BEFORE: HONORABLE ETHAN ALLEN DOTY, A.J.

PRESENT:

KARL LUNKENHEIMER, ESQUIRE
ASSISTANT DISTRICT ATTORNEY
FOR THE COMMONWEALTH

(MS.) MARILYN GELB, ESQUIRE and
JAMES M. MORAN, ESQUIRE
ATTORNEYS FOR THE DEFENDANT

A. CHARLES PERUTO, Attorney at Law, duly sworn.

DIRECT EXAMINATION

BY MR. MORAN:

Q Mr. Peruto, were you co-counsel with Judge DiBona in the representation of John Sullivan?

A Yes, I was.

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THE COURT: Mr. Peruto, let me ask you this: Were you counsel at the time

of --

THE WITNESS: Carchidi?

THE COURT: At the time of the filing of the appeal to the Supreme Court in the argument.

THE WITNESS: I don't know anything about the filing of it with the Supreme Court. I do know, to my recollection, that there was no argument.

THE COURT: I see by the record here that the Supreme Court did have the matter. I'm wondering whether this matter of this communication was ever presented to the Supreme Court. Do you have knowledge of whether it was or whether it wasn't?

THE WITNESS: No. My recollection was I had spoken to John Sullivan in prison, and Mr. Sullivan's family was communicating with me, and I was after Judge DiBona to file the brief or to give me the brief or give me something that could be filed. And I can recall that Mr. Sullivan himself was very upset over it, and I was too. And I constantly was calling Mr. DiBona saying that we have to have the brief.

Now upon later speaking to Judge Di Bona he tells me that there was some sort of draft sent to my office.

THE COURT: Well, he testified to that.

THE WITNESS: And I'm assuming that someone in my office might have done something about it. But I have absolutely no recollection of the Supreme Court ever getting anything on behalf of John Sullivan.

BY MR. MORAN:

Q Mr. Peruto, you never filed the brief on behalf of Mr. Sullivan with the Supreme Court?

A No, sir, I did not.

Q And at the time the matter went to the Supreme Court it was you who represented him since Judge DiBona was then on the Bench; is that correct?

A Well, I did not represent him beyond the trial. But it was my understanding from what Judge DiBona had told me that he did prepare a brief. And I thought that his successor in his private office might have been carrying that on in his behalf. But there I have to say that if the record indicates that I had further duty to John Sullivan at the conclusion of the trial, then I'd have to say I, too, am remiss because

I did not file on behalf of John Sullivan, and I'm embarrassed to say so.

Q Thank you, sir. I appreciate your being candid. Your appearance does appear, sir, in the record of the Supreme Court, which I'm reading from. It says, "For appellants, G. Fred DiBona and A. C. Peruto And Judge DiBona's name is written out. So apparently you did enter an appearance.

A Apparently somebody did enter an appearance. I have no recollection of my entering it myself.

Q So you never filed a brief, and I suppose you never orally argued the case before the Supreme Court?

A I never did anything for John Sullivan, which will go down to the day I die, because I, too, felt that it was the worst case in my life of an unfair conviction.

Q So that nobody did anything with respect to filing a brief or arguing this case before the Supreme Court on behalf of John Sullivan?

MR. LUNKENHEIMER: Objection, your Honor. He cannot testify to all the other lawyers in the City of Philadelphia.

THE COURT: I'll sustain that. If you ask him to his knowledge - -

MR. MORAN: All right.

BY MR. MORAN:

Q At least there were two attorneys who entered their appearance on this case, and as far as you know neither one did anything with respect to filing a brief for oral argument before the Supreme Court.

A I can only answer you this way, I didn't. I thought somebody else did. And I'm terribly embarrassed that nobody else did.

Q Now with respect to the Motion for New Trial in Arrest of Judgement that was filed in the lower court, sir, would you tell me why that you and Judge DiBona did not raise the issue of this secret communication between Mr. Sprague and Judge Barbieri?

A No, I can't answer that. It was prepared by Mr. DiBona at the time. I just don't know why that was not. It may have been an oversight because it occurred so early in the trial. But, however, that was formulated by the then Mr. DiBona. I don't know.

Q You also represented the other two defendants in this case; is that correct, sir?

A The other two I tried. I was trial counsel. Mr. DiBona was trial counsel for Mr. Sullivan.

Q And they were both acquitted; is that

correct?

A Yes, sir. Yes, they were. And it is correct that they should have been.

Q During the course of the Sullivan trial, did you receive information, sir, that a Detective McGill had taken a statement from Mr. McGrath, who was the Commonwealth's chief witness, and in that statement each contradicted what he said on the witness stand in the Sullivan matter?

A Not in that language. I'll have to explain, if I may.

Q Well, you can rephrase it.

A It appeared to me that when McGrath testified he was too pat, if you know what I mean, a feeling that you get as counsel, that he was too sure of the exact words. It appeared to me that in the heat of excitement, something that suddenly erupted, the hearing of shots while he's washing a wall in the conference room of Local 107, and everything happening so suddenly, it appeared to me that nobody could remember the exact words. So I was suspicious that he may have been rehearsed in how to say those words. So that was the indication, if such be an indication. I, therefore, pursued the matter and asked who questioned him. This was something that had been denied us in the Sullivan

case. In the case of Carchidi there was an objection, but the Court told the Commonwealth witness to answer the question. Following that I obtained the information that McGrath was questioned by Detective McGill. I caused McGill to be produced in court with his original handwritten notes. And they disclosed that there were several different versions of what had been said in that conference room by McGrath. And they were so widely divergent to each other that they could have been interpreted completely consistent with innocence of Carchidi was well as with guilt of Carchidi. And it appeared from them that the only thing presented by the District Attorney at the trial of Carchidi was the version which came out last which indicated some implication of Mr. Carchidi in the crime. I can recall very vividly at the time saying to Judge DiBona, "If only we had this information in the Sullivan case." And I said that to Mr. Carchidi, I recall, and later on to Mr. Sullivan in prison, "If only we were permitted to know even the detective's name by Judge Barbieri we could have subpoenaed this information for you and I'm sure it would have worked your acquittal as well."

Q What influence do you think it had on the acquittal of Carchidi?

MR. LUNKENHEIMER: Objection, your

Honor.

THE COURT: I'll sustain that.

BY MR. MORAN:

Q You said this was denied. I'm not quite sure if I understand what you mean by that. Are you saying that you requested from the District Attorney the information that McGill allegedly had?

A I'm saying that I didn't request the information in Sullivan's case about information that McGill had because I didn't even know McGill was the one who had it. We were precluded from even finding out what Detective could give us the information we wanted.

Q How were you precluded?

A By asking the Commonwealth witnesses in Sullivan's case on cross-examination who was it that interviewed McGrath or who had obtained statement of McGrath or who was it that recorded what McGrath said upon questioning. And all of that we were precluded from finding out. It was our intention in the Sullivan case if we could find out who it was that questioned McGrath, maybe we could question those people and get their original notes to find out if what McGrath was saying in the Sullivan trial was actually true or something that was twisted around.

Peruto - Direct

Q Did you specifically ask the District Attorney or the trial Judge for that information that McGill allegedly had in his possession?

A No. There was no way of formally asking for specific information or who the detective would be. In other words, we were kept so totally in the dark and not having supplied that there was even something that was helpful to John Sullivan, that we didn't even know enough information to seek information.

Q What I'm confused about, sir, and I'm trying to get at is, what was it that you were denied and by whom with respect to --

A Oh, I understand you. Judge Barbieri cut us off in the questioning either by objection -- I don't recall exactly what it was. But my recollection today is, and, of course, I can't give you word for word, but my recollection today is that during the trial when we sought the information whereby we could compare what McGrath was saying in trial to what he said immediately after the killing to the detectives, that we were cut off and denied any access to that information by the rulings of Judge Barbieri.

Q And did you feel that this information might have fallen within the framework of the Brady case?

Peruto - Direct

MR. LUNKENHEIMER: Objection, your Honor.

THE COURT: Sustained. You can argue that later.

THE WITNESS: Can I, Judge?

THE COURT: No.

BY MR. MORAN:

Q Aside from Detective McGill, during the Sullivan trial did you know that McGrath was questioned by a Detective Duffy and a Detective McGowan?

A McGrath was guarded closer than the fortunes of Fort Knox. No one could get near him. He was around the clock, every place he went, with detectives. We weren't permitted to even interview McGrath. I even complained about that. I said that a witness is a witness, not a witness for the Commonwealth or a witness for the defense. I said one side or the other may be favored by calling, but the man is a witness. Couldn't get near McGrath.

Q When did you first become aware then that McGrath -- excuse me -- that McGill had some information that might contradict McGrath?

A In the Carchidi trial.

Q How, sir?

A Because the Judge in the Carchidi trial

ruled that we should get the information as to who it was who interviewed McGrath. And we fell into it like a bonanza when we learned that it was McGill and that McGill still had his original notes and there the original notes were that showed they were many different statements made by McGrath. But there was no way of knowing that at the time of the Sullivan trial, because of the rulings made in Sullivan's case.

Q Are you saying then that you made the same specific request in the Sullivan trial that you made in the Carchidi trial for that information?

A Now whether we made the specific request at a particular time, I really cant recall. I do know that we sought it, whether it was in chambers or on record or somewhere or another. I do know that we sought it because I still had it in line to keep seeking it at the time of the Carchidi trial. There was still more objection. But we got it that time. And I can recall saying if we only had this at the Sullivan trial he'd have been acquitted too.

Q What was the position of the Sullivan appeal at that time when you decided that if you had had that information you might have been able to win the Sullivan case? Where was his appeal at that time?

A I don't recall. But I don't even think that

this Motion for a New Trial was disposed of yet.

THE COURT: Did you raise it on the motions?

THE WITNESS: I can't even recall that, Judge.

BY MR. MORAN:

Q Well, it's a matter of record. It was not raised.

A Well, then, if it was not raised I'm remiss in not having DiBona raise it, because I'm not familiar with that.

Q Now what was it in the McGill statement that would have had a bearing on the Sullivan trial, specifically?

MR. LUNKENHEIMER: Objection, your Honor. I don't think that that particular question calling for information that was sought at time of trial is relevant. We don't make decisions ex post facto upon what was revealed the decision --

THE COURT: Well, I don't think you're right and I don't think Mr. Moran is right. But it's already been covered. They wanted to impeach the testimony of McGrath.

MR. MORAN: I wasn't sure that was made clear.

THE COURT: That's made clear. I'll sustain the objection, but not for the reason you've given.

MR. LUNKENHEIMER: Thank you, your Honor.

BY MR. MORAN:

Q When did you first become engaged to represent John Sullivan?

A It would have to be some time after he was in prison, that is after the inquest. Exactly when, I don't recall. I do recall there being a Dessis problem, that he was never given any notice of the Grand Jury to which his case would be presented. So I know that that was raised and that leads me to conclude that our representation was after that.

MR. LUNKENHEIMER: Objection, your Honor --

THE COURT: Don't get so excited.

MR. LUNKENHEIMER: I'm sorry. I was anticipating.

THE COURT: Never anticipate Mr. Peruto.

THE WITNESS: What I meant by

that, it must have come afterward because I am certain if we were in it before, we would have raised that issue before what the District Attorney did to him at that time.

BY MR. MORAN:

Q Now in the Carchidi trial, did a Mr. Michael Hessian testify?

A I don't really recall. I'm trying my best to recall. It seems to me that he did.

Q Well, if you can't remember maybe I can refresh your recollection. Do you remember him testifying and contradicting McGrath?

A I seem to have some recollection that Mike Hessian told us that he spoke to McGrath soon after the killing and that McGrath had said something different to Mike Hessian than what McGrath said at the trial. Now I do recall being interested in having Hessian say that in the Carchidi trial. Now I'm trying to focus it in my mind. And I, therefore, think that he did testify because I felt that he would be an important enough witness that he should testify. The thing that causes me to waiver is the fact that I recall also that there was a power struggle, so to speak, going on in Local 107 where people were meeting with strange

accidents who wanted to run for office and that everybody connected with the officers or hierarchy of the Union was a little bit afraid to take the side of one faction or another. I do know that Mr. Hessian was terribly frightened at the time of the Sullivan trial and we didn't want to put on another witness who we could not rely on a hundred percent. But I think that by the time Carchidi did come to trial, Hessian did testify. But I can't be a hundred percent sure of that.

Q Do you mean to say he wouldn't testify in the Sullivan trial but he testified in the Carchidi trial?

A Well, the heat was a little less hot by the time Carchidi came to trial.

Q Well, at any rate you had made a decision not to present any testimony anyway, hadn't you?

A In the Sullivan trial?

Q The Sullivan case, yes.

A Yes. I can recall the great discussions that we had with Sullivan where we were so convinced that -- and we communicated this to Sullivan --

THE COURT: When you say great discussion, you mean lengthy discussion?

THE WITNESS: Lengthy discussion, yes, sir. Where we felt that he couldn't

possibly be convicted and, therefore, what's the sense in exposing the defense because we had two more defendants to try.

BY MR. MORAN:

Q Wait --

A And I'm afraid Sullivan suffered by that fact.

Q Wait just a minute, sir. You were concerned with the other two defendants you represented; is that correct?

A Yes. Why expose your defense if you've got two more people to come to trial and the Commonwealth has not presented a case?

Q So that entered into your consideration as to whether or not you presented a defense in the Sullivan case?

A Sure, it did. When we're talking about back and forth. For example, I've heard Judge DiBona testify today, and, yes, we were sort of playing devil's advocate. I didn't want the defense to go on because I thought we would only be exposing the defendant witnesses for the other two trials that were coming up. Now on the other hand, you see, the three defendants had already decided between themselves which of us they wanted to be chief counsel. John

Sullivan picked Fred DiBona, the other two defendants picked me. So certainly I had to be chief counsel and face the trial of the other two men. And as I look back on that, although it was not my thought that John Sullivan should be short-changed in any fashion, I'm afraid that it was my thought that I was over-solicitous for the other two defendants being ready to be tried.

Q Thank you. Now is it a fact that you recommended to John that he take the witness stand or did you not, or were you just playing the part of the devil's advocate?

A No. I can recall that he should testify strictly on the basis that a jury -- but it's difficult to get a man acquitted where the jury doesn't hear from him. On the other hand, there were some things in the personal life of John Sullivan that may have come out on cross-examination. For example, that phone call that was discussed by Judge DiBona. I was sure in my heart that Richard Sprague would follow through and ask him all about that call just for the purpose of embarrassing him as a married man having a girlfriend someplace else. And that I thought might hurt Sullivan more than the benefit that he would get out of putting the testimony on. But it was a value judgment. And I do recall bandering it back and forth. However, Fred

DiBona, if I can recall, went in the other direction. And you know, I'm not even sure now which of the two of us was pushing for him to testify or was pushing the other way. I'm even mixed up on that. But I do recall that Fred DiBona felt that there was not enough for it to go to the jury in the first place to result in a conviction. I do recall that we were both worried about it because of Judge Barbieri's constant statements, as Mr. DiBona testified to. And I do recall it was that sort of atmosphere, because Judge DiBona was so shocked by the conviction that I had to argue the penalty phase. He couldn't even speak to the jury.

Q Well, Judge DiBonn said that he urged the defendant to take the witness stand.

A Well, if that's his recollection, I'll have to say I can't refute it in my recollection.

Q Well, I want to know if it was you who urged him not to testify.

MR. LUNKENHEIMER: If anyone.

MR. MORAN: If anyone, naturally.

THE WITNESS: Since I don't recall, I'll put it this way: Which of the two of us urged him to testify or did not, or whether I did it as a result of

being sort of a devil's advocate -- I represent him regularly, Judge -- I would say that I would accept Judge DiBona's recollection. And it does seem to my recollection more in keeping with what I would have done because of the other two defendants yet to testify.

MR. LUNKENHEIMER: I'd move to strike that, your Honor, as mere speculation on the witness based on his own testimony.

THE COURT: I'll deny that. And you can argue it at the conclusion of the case.

BY MR. MORAN:

Q Did you know anything about this so-called Tony Salvatori who eventually called Rita Janda, one of the deceased in this case?

A Yes, I can recall something like that.

Q Now when you had a discussion with the defendant and with Judge DiBona with respect to whether he should or should not testify and whether or not certain evidence should be presented in his behalf, did you advise him that there was a certain Tony Salvatori who could offer testimony which might assist

him with respect to acquittal? Did you make the defendant aware of that?

A I don't think so. And I'll tell you why. The time of death had to be contrasted with the time of the phone call where Rita Janda had to have been spoken to. Now I don't recall what time it was, what the time limits that was set by the Medical Examiner where he fixed the time of death. I do recall that it was greatly in dispute. My recollection differs with Judge DiBona in that regard. I do recall that it was greatly in dispute. And the reason why I recall that it was in dispute is that I think that we obtained some information that Rita Janda and John Gorey, the decedents, had had dinner at the Schmidts Brewery Town Tavern. And I can recall saying that it could not have been that early, the killing, because they'd had dinner and the stomach contents, according to the Medical Examiner's report, showed a state of digestion which would be inconsistent with so early a death.

Q Well, you don't recall telling the defendant during the conversation with respect to whether or not you had presented a defense, that there was a witness by the name of Tony Salvatori?

A I don't recall whether I told him, in all honesty, but I know I told him I do think the witness

would be immaterial because the death could not have occurred that early anyhow and all we'd be doing was refuting the witnesses time of death. We were caught by surprise by the Medical Examiner refuting his own time of death and moving it up a couple of hours.

Q Did you tell the defendant that you had evidence that the two deceased had had dinner or drinks at the Brewery Tavern rather than in a diner that a Commonwealth witness testified to?

A I don't recall telling him that.

Q You don't recall telling Mr. Sullivan that?

A No.

Q Of course, if you had that testimony they were in the Brewery Tavern and not in the diner, that would have contradicted one of the Commonwealth's witnesses, wouldn't it?

A Oh, certainly.

Q And you don't remember telling the defendant that?

A No, I don't.

Q Do you remember there were allegedly three witnesses who were outside the 107 office building at the time of the alleged shooting that were standing by the window waiting for a 7:30 meeting? Do you remember having information with respect to those witnesses?

A Just this moment, during the asking of the question, I seem to recall something about witnesses having seen someone drive off with a flat tire, or something like that, and having heard shots from below the window where Gorey and Janda were.

Q You had an investigator by the name of Bill Christine investigate this case for you?

A Yes.

Q Do you remember him submitting a report to you saying there were three witnesses outside the Local 107 Headquarters who did not hear any shots?

A Yes.

Q Did you advise the defendant Sullivan when you were considering whether or not to put on a defense that these three witnesses were available and could help this defense?

A I don't recall advising him of that, but I do recall that I felt that it might be dangerous because one of the other two defendants leaving in a hurry might have been seen by those three witnesses and it might have damaged that defendant and it might have come out on the cross-examination of those witnesses in Sullivan's case.

Q So it might have hurt one of the other defendants that you represented?

A Yes, sir. And there a matter of judgment in the sense that we felt that the only thing that they had was the mere statement of McGrath and that the case would not even go to the jury.

MR. MORAN: Your Honor, can we take a couple of minutes break? The defendant has to go to the bathroom.

(WHEREUPON THE COURT TOOK A SHORT RECESS.)

CONTINUING DIRECT EXAMINATION

BY MR. MORAN:

Q Mr. Peruto, during your discussions with Mr. Sullivan and with Judge DiBona with respect to whether or not a defense would be presented, do you remember if you told the defendant that Mr. Hessian could testify and his testimony would contradict that of McGrath?

A No, I don't recall that being conveyed one way or another.

Q Who was it who made the ultimate decision, number one, not to have John Sullivan testify and, number two, not to present any evidence at all in his behalf?

A Well, it would have to have been Judge DiBona, and I'll tell you why. Although it appears that I'm co-counsel in the case of John Sullivan, such

was not completely the correct statement. The three defendants were together in the cell room when we were ready to go to trial. And the three of them were told now this is the situation, one of us will be permitted to do the cross-examination and the summations and the actual handling of the case. You're going to have to choose between us or any other lawyer of your choice. Sullivan indicated the desire that Judge DiBona was older and more experienced and he elected to have Judge DiBona try his case. The other two defendants elected to have me try their case. Judge DiBona and I then agreed that whichever of us would be selected to try the case the other of us would assist, but not in the sense of being coequal but merely to assist such as, you know, get papers ready or something like that.

Q And it's your recollection that it was Judge DiBona who made the decision and not the defendant?

A It's not my recollection as much as it is my statement that it would have had to have been him.

Q Well, you did enter your appearance at the trial along with Judge DiBona.

A I'm sure that I appeared at the trial. Whether it was a formal entry or not I can't recall. But I guess it would be tantamount to the same thing.

Motion in Arrest of Judgment for New Trial in the lower court there was no points raised with respect to some probable errors in the Court's charge?

A No, I can't. Everything was done in a very fast clip in the sense that what was done -- I don't mean that there wasn't sufficient time. What I mean by that is I would get flak from the defendant Sullivan's family that nobody is doing anything. I would in turn transfer the flak on to Judge DiBona who would promise that something would be filed, etcetera. Then I would get a copy or have made known to me what was filed. So actually I had no part in the actual filing of the papers or the formulation of them. I thought that these things, quite frankly, were raised. I'm surprised that they weren't.

Q But you know now that they weren't?

A Yes, I know now.

****

****

A I recall communications from the family to the effect that they had been trying to get Judge DiBona to act. And there were complaints about inactivity. And they complained to me in that fashion. I, in turn, would call Judge DiBona and say, "Look, isn't that ready yet?" Or, "When are you going to file it?"

Q I would ask you in reference to after the decision of the Supreme Court had come down.

A Oh, after the Supreme Court decision? No, I don't recall except for Marilyn Gelb communicating with me some time after that.

Q You indicated on direct examination that you couldn't speak to Mr. McGrath because he was guarded closely around the clock. Was the reason for that ever explained to you?

A The normal procedure when Dick Sprague tries a case.

Q You mean you don't recall it being stated at trial that his life had been threatened by members of 107?

A All of the cases that I can recall in history being tried.

Q I asked you about this case.

A Sir, this would include that case. I can never recall a case in which lives of witnesses were not alleged to be threatened by Dick Sprague.

Q Don't you recall Mr. McGrath stating that at the trial itself, in open court?

A I can recall him saying something about having fear because of some of the things that were going on around Local 107, but I don't recall him specifically saying that anyone connected with this case threatened him. I think he had some fears, but I don't recall him testifying to any specific threats.

Q Was Mr. Hessian guarded around the clock?

A I can't recall him being guarded around the clock, but then again he wasn't a cooperative witness, as I recall, for the Commonwealth. So I don't know why he would be guarded.

Q But you testified here that he also was in fear of his life, is that not true?

A Not from the case, but generally in fear of taking sides with any faction in the Union. Not that he had been threatened in any fashion, but in the sense that he did not want to get mixed up with one side or the other.

Q In other words, it was general policy in 107 if you took sides your life was in danger?

A I would say at the time this occurred it was the general policy at Local 107 always to have ten or 12 people with you.

Q Do you recall the name of the person that Mr. Sullivan telephoned?

A I don't recall the name of the person, but I recall that it was a young lady that was somewhere out of town.

Q And her last name wasn't Sullivan?

A I can just recall it was the kind of circumstances where it would almost be. That was one of the considerations.

Q In fact, it may have been?

A It may have been. I don't know what she called herself.

Q Now you heard Judge DiBona testify that Mr. Sullivan did not want to take the stand in the case. Does that match your recollection?

A Yes. The one thing that I'm acutely in recollection of is that he's a Judge and I'm not. And we're talking about a Judge testifying about Judge Barbieri, and they are equal jurisdiction. I still have to practice around here. And I can recall --

Q Do you not want to answer the question? Are you requesting permission not to answer?

A I would prefer not to.

THE COURT: He'd prefer that you withdraw the question.

THE WITNESS: Yes.

MR. LUNKENHEIMER: Well, your Honor, I don't think I will.

THE WITNESS: Okay. Would you give it to me again? I forgot it.

THE COURT: State the question.

BY MR. LUNKENHSIMER:

Q Do you recall whether John Sullivan said he did not want to take the stand?

A - It seems to me —

Q Do you recall one way or the other?

THE COURT: Let him answer it.

THE WITNESS: The way I recall it my recollection seems to be that John Sullivan did want to testify because he kept saying over and over, "I didn't do nothing. I got nothing to hide." Now whether he changed his mind or didn't testify because of what was said to him about the pitfalls of "Look, John" -- words to the effect -- "Look, John, even though you have nothing to hide, Sprague, you're

playing in his ballgame, in his yard, and he can make you look bad on these relationships with other women," and things like that. And that may have been the deciding factor. I don't know. But my recollection seems to be that Sullivan did want to testify in the sense that he felt he had nothing to hide.

Q But you don't really have a specific recollection of the conversations?

A No. All my recollection is that in keeping with what I recalled, he indicated that he did want to testify is the fact, that since he didn't testify it must have been something that either I said or Judge DiBona said to him.

Q Now you indicated on direct examination that you had an investigator employed. And his name escaped me. I didn't get it. Bill somebody. Did he indicate to you that the three gentlemen outside the Union Hall had made statements to the police?

A I don't know if he said that they made statements or not. I just don't recall. I recall there being a few witnesses outside. And I can recall something about that. But I can't recall whether he said that the police were aware of it or not.

Q Did you know that they told the police that they heard the sounds of firecrackers and that one of them said he heard the sound of shots?

MR. MORAN: Objection, your Honor.

THE COURT: No, I'll overrule that.

THE WITNESS: I don't recall. Any of the actual specifics of what any of them actually said, I don't now recall. I'm aware that there were some.

BY MR. LUNKENHEIMER:

Q Do you recall Mr. McGrath testifying at trial that he had spoken to all of the officers mentioned by petitioner's counsel on direct examination, McGill, Duffy and McGowan?

A I don't recall that specifically.

Q Do you recall whether or not it was brought out on direct examination or on cross-examination that Mr. McGrath gave different statements to those officers than he was giving at trial?

A No. My recollection is that that did not occur because I think that I was surprised -- the way I recall it now I was surprised that when I heard or came across that information in Carchidi's trial. Now

if that occurred, maybe it's something that I might have stepped out to the men's room for or something like that. But I don't recall anything like that. And I do recall that I was surprised to learn what those various statements made by McGrath were at the Carchidi trial, because I think there were seven or eight different versions.

Q Do you recall Judge Barbieri mentioning at the Writ of Coram Nobis that the inconsistencies in Mr. McGrath's prior statements had been brought out before the jury at trial?

A I don't recall Judge Barbieri saying that. I recall a lot of things Judge Barbieri said, and they are all in tune with what Judge DiBona remembers. But I'm glad he said it, he's a Judge.

Q What was the nature of Judge DiBona's participation in the defense of Gregory Carchidi and Tony DiPasquale?

A Well, he assisted me in the same fashion that I assisted him in the Sullivan trial.

Q He did not participate in the questioning of the witnesses?

A No, I don't recall him doing so.

Q And he had been retained by Mr. Sullivan's family privately; is that correct?

A I don't know what arrangements there were with regard to fee. I don't even recall that now.

Q Well, I'm not asking you about how much was paid. Do you recall whether it was a court-appointment for the two of you or whether you were privately retained?

A Recalling the size of the fee, I can't even say we were retained. But it was private.

Q I'm sure you don't still work as cheaply.

A If I may make a commercial, I still am very reasonable.

Q But only to the wealthiest of clients.

A Well, they are before they get me.

MR. LUNKENHEIMER: I'm glad we have that on the record somewhere, your Honor.

THE COURT: I don't think we have to have all this discussion about counsel fees on the record. Do you, Miss Gelb or Mr. Moran?

MR. MORAN: No.

MS. GELB: No, except that I'm glad that he brought out the fact that Mr. Peruto was not court-appointed because the Supreme Court seems to think that he was

when we filed our opinion.

MR. LUNKENHEIMER: Your Honor, I move to strike that unless it can be made part of the record.

MS. GELB: Your Honor, the Supreme Court in Commonwealth v. Sullivan sc states.

THE COURT: He's testified and it's in the record. You've testified that you were not court-appointed but privately retained.

THE WITNESS: That's right.

MR. LUNKENHEIMER: I have no further questions.

THE COURT: Any redirect?

MR. MORAN: Yes, sir.

MR. LUNKENHEIMER: Your Honor, it may become necessary for me to recall Mr. Peruto in terms of the issue of the entry of appearance in the Supreme Court. I don't have the document in terms of whether or not he signed it or someone else signed it present in court today.

THE COURT: Well, can't you work that out?

THE WITNESS: If we have it and I could look at it, your Honor, maybe I could be of some help. I could recognize my signature if there is a signature on any of those pieces of paper.

THE COURT: He may have to go to Montgomery County or Delaware County or somewhere, you know.

MR. LUNKENHEIMER: Media, your Honor.

THE COURT: You want to get him to testify while he's here.

THE WITNESS: As I recall, all of the papers that Judge DiBona filed, he signed the petitions and the various post trial motions, etcetera, etcetera, and put my name underneath his typewritten name. But I don't recall ever personally signing any of them.

MR. LUNKENHEIMER: Well, your Honor, again I request the opportunity, if it becomes necessary and if the stipulation could not be agreed to, to recall Mr. Peruto.

THE COURT: Well, you're

anticipating something that may not occur. Now if that occurs, then you can move for it. But at this point we're not anticipating it.

MR.MORAN: May I continue, sir?

MR. LUNKENHEIMER: Yes, please.

REDIRECT EXAMINATION

BY MR. MORAN:

Q Counsel for the Commonwealth asked you certain questions with respect to things Judge Barbieri said to you. Do you recall at various times during the course of the trial when there was a question to the admissibility of certain evidence Judge Barbieri saying that he was going to let the evidence in and give the D.A. plenty of leeway because they could not get an acquittal anyway --

THE COURT: Get a conviction.

MR. MORAN: Excuse me. Get a conviction.

MR. LUNKENHEIMER: I make the same objection as to hearsay.

THE COURT: I'll overrule it. Do you understand the question?

THE WITNESS: Only too well. I understand that Judge DiBona is a Judge.

But I must say that I do agree in the same fashion as Judge DiBona testified.

BY MR. MORAN:

Q And one further question on that line. Could you explain to me, sir, if that is true, that Judge Barbieri made a decision with respect to the admissibility of evidence on that ground, why that wasn't raised in the lower court in your motion for a new trial and arrest of judgment?

A The only thing that I can do is offer by way of explanation that out of deference to the fact that these were off the record remarks and that perhaps Judge DiBona felt that he could not raise them in that regard. I don't know.

Q During the course of your discussion with Mr. Sullivan and Judge DiBona with respect to whether or not there would be any evidence presented, did you communicate to Mr. Sullivan Judge Barvieri's feelings with respect to the D.A. unable to get a conviction? In other words, did you tell John Sullivan that Judge Barbieri said time and time again considering the course of the trial that there was not enough evidence to get a conviction?

A Oh, yes. All of that attitude that Judge DiBona testified to was --

MR. LUNKENHEIMER: I move to strike the answer as not responsive. The question was did you tell him.

THE WITNESS: I probably told him as much as Fred DiBona told him because we both heard it. And my recollection is either he told him and I agreed that that's what occurred or I told him and Fred DiBona agreed that that's what occurred.

MR. MORAN: Thank you, sir. That's all I have.

RECROSS-EXAMINATION

BY MR. LUNKENHEIMER:

Q In other words, you don't know specifically whether you told him or not?

A No. I specifically know that he was told. Exactly whose mouth was moving at the time of the telling I can't be certain, but I'm absolutely certain that each of us said it on more than one occasion.

Q You don't know who said it but you're sure each of you said it?

A Yes, that's right.

Q That's an interesting physical ability.

A Sure, especially in view of the fact that it was said so many times.

MR. LUNKENHEIMER: I have nothing further.

(HEARING CONTINUED TO APRIL 25th, 1974.)

EXCERPTS FROM TESTIMONY OF JOHN SULLIVAN
APRIL 25, 1974

IN THE COURT OF COMMON PLEAS

FIRST JUDICIAL DISTRICT OF PENNSYLVANIA

CRIMINAL TRIAL DIVISION

lead 187

COMMONWEALTH	:	NOVEMBER TERM, 1966
V.	:	
JOHN SULLIVAN, Defendant	:	NUMBERS 190 and 193

POST CONVICTION HEARING ACT PETITION

- - -

Room 784, City Hall
Philadelphia, Pennsylvania

- - -

April 25, 1974

- - -

BEFORE: HONORABLE ETHAN ALLEN DOTY, A.J.

PRESENT:

KARL LUNKENHEIMER, ESQUIRE
ASSISTANT DISTRICT ATTORNEY
FOR THE COMMONWEALTH

(MS.) MARILYN J. GELB, ESQUIRE and
JAMES M. MORAN, ESQUIRE
ATTORNEYS FOR THE DEFENDANT

Q Now did there come a time after that date when you had engaged other counsel?

A Yes, ma'am.

Q Do you have any recollection of when that was?

A It's sometime in December.

Q And who are the attorneys that you engaged?

A Mr. G. Fred DiBona and A. Charles Peruto.

THE COURT: Now when you say December, you mean 1966?

THE WITNESS: Yes, sir.

BY MS. GELB:

Q And that was apparently subsequent to your indictment. And I may state for the record that the Bills of Indictment indicate that the Bills were returned on November 14th, 1966. Taking that as a focal point, Mr. Sullivan, you retained Mr. DiBona and Mr. Peruto subsequent to November 14th, 1966; is that correct?

A That's correct.

Q Will you tell the Court the circumstances of your retaining these attorneys to represent you.

A Yes. Well, as I was arrested with two other fellows, and we discussed the matter, and I had told them that my preference was to hire Mr. Walsh to

handle my case. I said the only problem was that I didn't have the money sufficient enough to pay Mr. Walsh. And it was brought out to me by the other two fellows that they had something to do with Mr. Peruto and that Mr. Peruto and his partner, which they didn't name at the time, would handle the case and handle the whole three of us. And I agreed to go along with this.

Q Did you at any time pay Mr. DiBona or Mr. Peruto to represent you?

A I did not.

Q Did you at any time ask them to represent you personally?

A Well, it was a foregone conclusion after they arrived to visit us at the prison.

Q Did you make the contact to ask them to come visit you?

A I did not, no.

Q To your knowledge did anybody, any member of your family pay any counsel fees to Mr. Peruto or Mr. DiBona?

A Not to my knowledge.

Q By the way, Mr. Sullivan, there is no question that you did not have court-appointed counsel for your case; isn't that correct?

A I wasn't aware of it if I did.

Q Mr. DiBona and Mr. Peruto were the only attorneys you had subsequent to that one retention of Mr. John Patrick Walsh on November 3rd; is that correct?

A That's correct.

Q Now, did you meet with Mr. DiBona and Mr. Peruto prior to your trial of your case?

A Yes, I did.

Q Mr. Sullivan, after your attorneys were retained, was there ever an occasion when you met your attorneys jointly with the other two co-defendants in this case?

A Yes, there were numerous occasions.

Q And were there discussions held among all of you with respect to developing information in an investigation of this case?

A Yes, ma'am.

Q Did you ever in the course of any of those discussions meet with an investigator named William Christine?

A Yes, I did.

Q And did you meet with him at any time when other co-defendants were present as well?

A Sometimes and sometimes not.

Q I take it then that there was more than one time that you met with Mr. Christine?

A Yes. He was present just about every day in City Hall.

Q Prior to the time your cases were tried, did you ever meet with him and counsel?

A Just one time he came up just for me to sign a paper, pauper's oath that he delivered.

Q Did you participate in and contribute information to your attorneys and to Mr. Christine that would tend to establish your innocence?

A Yes, ma'am.

Q As a matter of fact, did you discuss with your attorneys possible testimony of a gentleman named Hessian?

MR. LUNKENHEIMER: Objection, your Honor. I've allowed the questions to be leading up to now for expediency, but in this area I wish they would not be leading questions in accordance with the Rule.

THE COURT: Don't lead.

MS. GELB: Right.

BY MS. GELB:

Q Would you tell the Court what kind of information you gave to your attorneys with respect to establishing your innocence in connection with these

charges.

A In respect to Mr. Hessian?

Q If you want to start there first, Mr. Sullivan, go ahead.

A Mr. Hessian was the head of the Union. At that time the Secretary-Treasurer was the head of the Union. And he was in that title. And after this tragedy occurred, Mr. Hessian came to me and said as the Head of the Union that he was advised --

MR. LUNKENHEIMER: Objection, your Honor. Again we are going into hearsay.

THE COURT: Well, just tell us what you did.

BY MS. GELB:

Q What did you tell your attorneys with respect to Mr. Hessian?

A Oh, I understand. I said that I spoke with Mr. Hessian and Mr. Hessian advised me that Mr. McGrath --

MR. LUNKENHEIMER: Objection.

THE COURT: This is what he told his attorneys. I'll overrule that. Go ahead, tell us what you told your attorneys.

THE WITNESS: That Mr. Hessian

said that Mr. McGrath visited him at his home Sunday morning and told him that he didn't see anything, didn't hear anything, didn't know anything. Mr. Hessian said he would so testify in my behalf.

BY MS. GELB:

Q Did Mr. McGrath in fact testify in the case against you?

A Yes, he did.

Q And the record will speak for itself. But can you tell the Court, did Mr. McGrath say that he didn't see anything or hear anything?

MR. LUNKENHEIMER: Objection.

THE WITNESS: He did not.

MR. LUNKENHEIMER: The record speaks for itself. It speaks for itself, your Honor.

THE COURT: All right, I'll sustain that.

BY MS. GELB:

Q At any rate, you spoke to your lawyers about asking Mr. Hessian to testify in your behalf?

A Yes, ma'am.

Q Was there any other area about which you spoke to your lawyers that related Mr. Hessian's

testimony as tending to establish your innocence?

A Well, Mr. Hessian's testimony showed that Mr. McGrath wasn't telling the truth.

Q Was there any other area, aside from Mr. McGrath's testimony, about which Mr. Hessian had any information that you gave to your lawyers?

A I don't understand that question.

THE COURT: Did you tell your lawyers anything else about Mr. Hessian? I think that would cover it.

THE WITNESS: Not to the best of my recollection.

BY MS. GELB:

Q Was Mr. Hessian President of the Union at that time?

A He was Secretary-Treasurer of the Union.

Q Was Mr. Hessian in a position to know the schedules of those persons --

MR. LUNKENHEIMER: Objection. Again, your Honor, she's leading the witness.

THE COURT: I'll sustain that.

BY MS. GELB:

Q Did you ever have a conversation with Mr. Hessian that related to --

MR. LUNKENHEIMER: Objection.

Same objection.

THE COURT: Well, finish your question.

BY MS. GELB:

Q Mr. Sullivan, did you ever have a conversation with Mr. Hessian with respect to your hours of employment at the Union?

A Yes.

MR. LUNKENHEIMER: Objection.

THE COURT: I'll overrule that.

MR. LUNKENHEIMER: It's leading, your Honor.

THE COURT: Well, there has to be a certain amount of it.

MR. LUNKENHEIMER: Well, your Honor, the purpose of the leading question and allowing her to do it is allowing her to get information --

THE COURT: No, I don't think that this is a prejudicial question.

MR. LUNKENHEIMER: The answer has already been no, there was nothing else said about Hessian. Now without leading questions --

THE COURT: Your next question.

BY MS. GELB:

Q As a matter of fact, what were your hours of employment at the Union?

A I had no specific hours. My hours, if I started at eight o'clock and worked to nine o'clock, if I started at seven o'clock and worked to three o'clock was my own affair.

THE COURT: What was your title or what were your duties?

THE WITNESS: I was what you would call a Health and Welfare Official, sir. I used to collect delinquent accounts.

BY MS. GELB:

Q Were you in fact working at your job on June 17th, 1966?

A Yes, ma'am, I was.

Q Were you working on your job about seven o'clock in the evening on June 17th, 1966?

A Yes, I was.

Q Is there anyone who was in a position to know that you were then working on your job?

A Well, Mr. Hessian and all the business agents. And just about everybody knows that I was in the building quite late on numerous occasions.

Q So that it was not unusual for you to be

in the building?

A No way at all.

Q And would Mr. Hessian be in a position to know that?

MR. LUNKENHEIMER: Objection.

THE COURT: I'll sustain that.

BY MS. GELB:

Q Did you at any time tell your attorneys that Mr. Hessian should be called to testify in your behalf because of the knowledge that he had about your working hours?

A Yes, ma'am.

MR. LUNKENHEIMER: I object to the leading form of that question.

THE COURT: I'll overrule that.

THE WITNESS: Yes, ma'am.

BY MS. GELB:

Q What did you tell them?

A I told them that Mr. Hessian can verify the fact that I worked in the building and that he himself was present with me on numerous occasions, amongst other people. We had a habit of staying there late. It was a known habit.

Q And you told that to your lawyers?

A Yes, ma'am, I did.

Q Did there come a time during the course of your trial when you became aware of any other evidence that you gave to your lawyers that might tend to establish your innocence?

A Yes, ma'am.

Q Will you tell the Court just what that was.

A Yes. There was testimony relating to the fact that Mr. Gorey and Mrs. Janda had dinner in a diner at 54th and Spring Garden. I just don't recall just where. And it came to my attention through Bill Christine that they had dinner at the Brewery Tavern. And I believe that's located at Hancock and Girard. I'm not positive.

Q Did you discuss this with your lawyers?

A I did.

Q And did you at any time ask them to adduce that evidence at your trial?

A I did.

Q Did you at any time discuss with your lawyers any testimony that Detective Houston gave at your trial?

A Yes, ma'am, I did.

THE COURT: What was the name?

MS. GELB: Detective Houston.

THE COURT: No, the name of the

lady who had dinner at the Tavern.

MS. GELB: That was one of the decedents, your Honor, Mrs. Janda, J-a-n-d-a.

THE COURT: Mrs. Janda?

MS. GELB: Yes, sir.

THE COURT: And who was the other person?

MS. GELB: The other decedent, Gorey, G-o-r-e-y.

THE COURT: All right.

BY MS. GELB:

Q Did you have occasion to discuss with your attorneys the testimony that Detective Houston gave in the Commonwealth's case?

A Yes, ma'am, I did.

Q And did you suggest to your lawyers any testimony that you ask them to call that may have tended to establish that Detective Houston was not testifying truthfully?

A Yes, ma'am. Immediately I did.

Q Immediately. When was immediately, what point?

A As soon as he made the statement that he made. And I leaned over and told him that it was not true and we could prove it was not true.

Q What did you say to your lawyers?

A I said that I was recommended at that time by a fellow by the name of Gerald Rome, who was the Union lawyer at the time, and that I engaged Mr. Gerald Rome when I was taken down to the Roundhouse for questioning. And Mr. Rome represented me at that particular interrogation, if that's what you want to call it. Now before Mr. Rome got there, I was seated at a desk with Detective Houston, and he asked me my name and I replied. He asked me my address and I replied, and my phone number. And after the phone number he said, "Well, I want to ask you some questions that's strictly routine." And I says, "It's my understanding that you've spoken to other people that belong to the Local." And he says, "Yes, I have." I said, "It's my understanding that they had the Union attorney present." He said, "Some did, some didn't." I said, "If you don't mind, I'd like to call him." He said, "Well, you don't need him. Save the Union money." I said, "If you don't mind, I'd like to call him." So he gave me access to the phone. I called the Union office. The hotel -- excuse me. The operator at the switchboard called Gerald Rome and they had what they call a three-way connection. She got Mr. Rome, and I spoke to Mr. Rome, told him where I was, and told him

that I was with Detective Houston. I said that I gave him my name, address and phone number and I asked to speak to you. He said, "Did you say anything else?" I said,"No, sir." He said, "Would you put him on the phone." And I pointed to Mr. Houston. He picked up an extension and he got on the phone.

Q And this was all in your presence?

A Yes, ma'am. I was on the phone.

Q Just to clarify, before we go on with this any further, can you tell the Court when this took place?

A I don't know the date.

Q Was it before the inquest on November 31st, 1966?

A Yes, definitely.

Q Go ahead.

A And Mr. Houston picked up the phone and Mr. Rome said that he would be down --

MR. LUNKENHEIMER: Objection, your Honor.

THE COURT: Overruled. Go ahead.

THE WITNESS: He said that he couldn't make it in any time less than an hour, that he had some business to take care of, that he said he would be definitely

there in an hour and he was not to talk to me or ask me any questions. He said, "Fine, counsel." And that's the way he answered. I said, "Thank you. I'll wait for you," and I hung up the phone and he hung up the phone. And after that, Mr. Houston came to me and he pointed to a door. He said, "We're going to have to lock you up until he gets here." And I said, "Am I under arrest?" He said, "No." And I said, "Well, I'm going to go down and have lunch." And that's what I did, went down and had lunch. And an hour or so later Mr. Rome came and we were questioned in Mr. Rome's presence, or I was questioned.

BY MS. GELB:

Q Did you tell Mr. DiBona and Mr. Peruto exactly what you've just related to the Court now?

A Yes, ma'am.

Q And was your account of what happened exactly the way Detective Houston related it at trial?

A No, ma'am.

Q And when you heard Detective Houston's testimony at your trial, was that the occasion on which you spoke to your attorneys and gave them some

directions?

A I immediately told them.

Q And what did you tell them at that point?

A I told them that Mr. Houston was not telling the truth. And I explained that I had asked for an attorney. And Mr. Houston didn't say that. Mr. Houston said he was interrogating me and I leaped up off the chair and said I demand an attorney. He said words to the effect that John Sullivan said he just wasn't there and he wanted an attorney immediately.

Q And you're saying that you told your lawyers that that wasn't so?

A As soon as -- the words didn't even get out of his mouth.

Q Did you tell your lawyers the name of any person who might be able to so testify?

A I told him that Gerald Rome was there and Gerald Rome could verify the fact that Mr. Houston was not telling the truth.

Q And that took place during the course of your trial; is that correct?

A That is correct.

Q Now, Mr. Sullivan, up until the moment that the Commonwealth rested its case, at the conclusion of its testimony, did you and your attorneys have any

conversation to the effect that you would not testify in your case?

A No, ma'am.

Q What was the understanding that you and your attorneys had on that issue?

A Quite frankly, I thought all along that I was going to testify.

Q Was it your desire to testify?

A Oh, definitely.

Q Did you communicate that to your attorneys?

A Definitely. I was quite confident, and I relayed that message to him quite clear.

Q Now when did you relay that message?

A All during the course of the trial.

Q Can you tell us some of the things that you said?

A No, ma'am.

Q Was there any discussion between you and your attorneys to the effect that no testimony would be put on at the conclusion of the Commonwealth's case on your behalf?

A No, ma'am.

Q Did you at any time talk to your lawyers with respect to putting on testimony in your defense?

A Yes, ma'am, we spoke of it.

Q Did you speak of it before the Commonwealth rested its case?

A Yes, ma'am.

Q And did you talk about what testimony would be put on?

A I spoke of Mr. Hessian and I spoke --

Q Just answer this: Did you speak to your attorneys about what testimony would be put on?

A Yes, ma'am.

Q Now after the Commonwealth rested its case, did you also speak to your attorneys about your testifying and about putting on other testimony in your defense?

A Yes, ma'am.

Q And when did that take place?

A In the Judge's chambers, after the Commonwealth rested its case.

THE COURT: Was the Judge present?

THE WITNESS: No, sir, he was not.

BY MS. GELB:

Q This was a conference that you had with your lawyers; is that right?

A Yes. They asked permission to use the

Judge's chambers at the day's ending of the proceedings that day.

Q Now you've heard the testimony of Judge DiBona earlier in this proceeding that to the effect that that conference lasted for quite a long time. Is that also your recollection?

A Yes, ma'am.

Q Now will you tell the Court just what is your recollection of what took place during that period of time that you talked to your lawyers about testifying and about the conduct of your case.

A Well, when the Commonwealth rested its case they asked permission to use the Judge's chambers.

THE COURT: Was anybody else present but you and your attorneys?

THE WITNESS: I'm going to name them, sir. We went into the Judge's chambers and present was Mr. G. Fred DiBona, Mr. Peruto, Mr. DiBona's son and his intendant son-in-law, I believe. Now I don't know if he turned out to be, but he was at the time. And it was the four of us in the Judge's chambers.

Q And what were you talking about?

A The five of us.

Q What were you talking about?

A What they did when we got in there, Mr. DiBona and Mr. Peruto reviewed the whole entire proceedings from beginning to end. And all we did was listen. And they went back and forth together with all the testimony that was given. Now after this was done they looked at me, spoke to me and said, -- explained. Then they started to explain each point. And we went through all of that. And Mr. Peruto -- well, Mr. Peruto, actually. Mr. Peruto said, "Fred, I got an idea that I don't think we should put on a defense because there's absolutely no evidence in this case at all." And I said, "Wait a minute." I said, "At least I think I should take the stand." I said, "It's not right for me not to take the stand." Mr. DiBona agreed. He said, "I think John should go on the stand." And then we just haggled back and forth. I don't want to keep repeating. We kept going over all the issues of the case and we were talking back and forth and they kept repeating over and over again that there was no evidence involved in the case, that Mr. Barbieri -- they didn't say Judge Barbieri or anything -- Barbieri has indicated to us there's no evidence whatsoever and there's no question of you getting acquitted in this

incident. Like I say, we haggled. This went on for an hour and a half, two hours, maybe two hours and 15 minutes.

Q Well, exactly what did you haggle about?

A Well, most of it was haggling about I wanted to take the stand. Mr. Peruto says, "John, if you take the stand he's going to paint you black and bring up your personal life." I said, "Fine. But that has nothing to do with the case." And I said, "I have nothing to hide." He said, "It doesn't look good." And I argued and argued and argued that even though it was embarrassing I thought that I should. And they insisted that it wouldn't look good and he would "Cut me up" is the words he used.

Q Now what happened at the conclusion of that conference?

THE COURT: Who would cut you up?

THE WITNESS: Mr. Sprague would cut you up.

BY MS. GELB:

Q Now what happened at the conclusion of that conference?

A And we continued to go, like I say, back and forth. Then I said, "Okay." I said, "At least put Micky on the stand to show that Micky didn't tell the truth."

Q Who did you mean by that?

A Michael Hessian.

Q And what exactly did you mean by that?

A Well, I knew at the time that Mr. McGrath went over and spoke to Mr. Hessian, and I knew that he told him another story that what he related on the stand. And I said it would be important for me for Mike to show that Mr. McGrath made it a point to go to his house and tell him. And I thought that was important at the time.

Q Did you make any other suggestions to your attorneys as to any other witnesses who should be put on even if you didn't testify?

A Yes, ma'am. It was my understanding in his opening statement, if I remember it correctly, he said there was people present at the particular time and they would be of some value. And I said, "I think that they should be called to show what their value may be."

Q Now what value were you given to understand they would be? And by people, would you explain what you mean by people present?

A Yes, ma'am. There was to take place that evening, to my understanding, a meeting. And directly

under this window where these people were killed there were people standing there having conversation, waiting to enter the building for the purpose of this meeting. And it was my understanding that at the time this death occurred, or they say it occurred, that these people underneath the window heard nothing whatsoever. And it is my understanding from the testimony that there was something like 12, 13, 14, 15, bullets fired.

Q You heard that testimony?

A I've heard that testimony. I don't know anything about firearms.

Q As a matter of fact, Mr. McGrath testified during the course of the trial that there were people outside.

A He stopped and talked to the people outside.

Q Now was it those people who you spoke to your attorneys about?

A Yes, ma'am.

Q And was it those witnesses that you meant when you asked them to call them to testify that they heard nothing?

A Yes,ma'am.

Q Now how was the decision ultimately made, number one, that you would not testify, and, number two, that no other witnesses would be called in your behalf?

A It went back to the same premises, the fact that there was no evidence and Mr. Barbieri, as they keep saying, Barbieri keeps saying there is no way you're going to get an acquittal and there is no sense risking anything that's going to hurt the other two guys, and we can get away with winning this case here.

Q Now you said a moment ago that Barbieri said to your lawyers there is no way you're going to get an acquittal.

A I didn't say that.

Q What did you say?

A I said there was no way that I was going to be acquitted.

THE COURT: That he was not going to be acquitted?

BY MS. GELB:

Q Is that what you meant, that you were going to be convicted?

A Can we start all over again?

Q Explain what your understanding was.

A That I wasn't going to be convicted.

Q When you just said a moment ago that your attorney said that they didn't want to put witnesses on because somehow it might hurt the other two guys, what was your understanding of that?

A I didn't really comprehend it. Quite frankly, I was in a gaze, you know, I was very aggravated, very mad.

Q Did you know what your attorneys meant when they said the other two guys?

A The two co-defendants.

Q And they told you that at the time that this discussion was taking place?

A Yes. They said there is no sense in putting anything on that may hurt the other two because we've got this case won.

THE COURT: Who said that?

THE WITNESS: Mr. Peruto and Mr. DiBona, sir.

THE COURT: Both of them?

THE WITNESS: Not specifically. I would say Mr. Peruto said it, sir.

BY MS. GELB:

Q Now, Mr. Sullivan, after the trial did you discuss the motions for a new trial and any other post-trial motions that may be filed in your case with your attorneys?

A No, I did not.

Q Do you know in fact whether your attorneys obtained the notes of testimony and reviewed them before

the preparation of the motions?

A I don't know that for a fact.

Q Did you ever see a copy of any brief that was filed in support of the motions for a new trial?

A In Common Pleas Court?

Q Yes.

A Yes, I did.

Q Now after the trial, did there come a time when you became aware of the existence of certain witnesses who might have been used at your trial?

A Yes. Sometimes afterwards.

Q Do you recall the names of those persons?

A One was the name of Tony Salvatore or Anthony Salvatore.

Q Was there anyone else who you became aware of after the trial, to your recollection?

A Detective McGrath. McGill, I believe his name is. This was much, much later.

Q Now will you tell the Court who made you aware of the existence of Mr. Salvatore as a witness in your behalf?

A Well, I understood that Mr. Moran, through his investigator, found this information out, that Mr. Salvatore had called the Local Union Hall that evening at 7:40, 7:45, or somewhere thereabouts, and he spoke

to Mrs. -- and Mrs. Janda answered the phone and identified herself, and Mr. Salvatore asked for someone, a business agent at the Local, and she had related that he just wasn't present and that was the end of the conversation.

Q Now did Mr. Peruto or Mr. DiBona ever tell you that they had that information?

A No, ma'am. It was a shock to me.

Q Now what is the significance of the time 7:40 P.M., Mr. Sullivan?

MR. LUNKENHEIMER: Objection, your Honor.

MS. GELB: I think that's important.

MR. LUNKENHEIMER: It's calling for a conclusion of the witness based on the testimony. It's a legal conclusion that she's asking.

THE COURT: It's just the way the question is asked. I'll sustain the objection.

BY MS. GELB:

Q Mr. Sullivan, you indicated that you became aware of some information that Mrs. Janda had answered the telephone in response to a call from Mr. Salvatore

at 7:40 in the evening.

A Yes, ma'am.

Q Now did the time of Mrs. Janda's death figure in the case against you?

A Yes, ma'am.

Q And after you heard the evidence against you, did you become aware of the significance of 7:40 P.M. with respect to that evidence?

A Yes, ma'am, very much.

Q Now what was the evidence relating to the death of Mrs. Janda?

MR. LUNKENHEIMER: Objection, your Honor.

THE COURT: This, I assume, is in the record, is it not?

MS. GELB: Yes, your Honor.

THE COURT: Well, if it's in the record --

MR. LUNKENHEIMER: His opinion is irrelevant. It's for the Court to review.

THE COURT: You may ask him why he wanted Mr. Salvatore to testify. You can ask that.

BY MS. GELB:

Q Mr. Sullivan, did you decide that you would

like to have Mr. Salvatore testify in your behalf if you had an opportunity to put him on the witness stand?

A Yes, ma'am.

Q And why?

A Because the Medical Examiner's written report, signed written report, I might add, stated that the death was between nine and three in the morning.

Q 9:00 P.M. and 3:00 A.M.?

A 9:00 P.M. in the evening to 3:00 A.M. in the morning. And at trial Mr. Sprague said the death was seven to 7:30. And it was intense examination on that point. And it was brought out that the Medical Examiner's papers were shown that after months of investigation and autopsies and everything that they conduct, the time of death was between nine and three. And Mr. Sprague insisted that it was between seven and 7:30.

Q Now you mention a Detective McGill and you said that you had discovered after your trial that Detective McGill had some evidence that might be helpful to your case. Will you tell the Court about that.

A Yes. I discovered that at the Carchidi trial.

THE COURT: This was after your trial?

THE WITNESS: Yes, sir.

BY MS. GELB:

Q Will you tell the Court what it was that you discovered.

A Yes. Going back at my trial, McGrath had made, his testimony. And Mr. DiBona and Mr. Peruto asked the Court to please relate to them who the detective was that interrogated Mr. McGrath so we could impeach his credibility. The District Attorney refused to give us the name of the detective. Mr. DiBona said that we can't subpoena the whole Police Department. He refused. The Judge upheld him. We never got the name of the detective.

Q Now subsequent to your trial, what happened with respect to this?

A Now the same incident happened at the Carchidi trial.

MR. LUNKENHEIMER: I object to any testimony about the Carchidi trial. I suspect Mr. Sullivan was in jail and not available for the Carchidi trial.

THE WITNESS: No, I was there.

THE COURT: You were present?

THE WITNESS: Yes.

THE COURT: I'll overrule the

objection.

BY MS. GELB:

Q And will you go on and relate to the Court what there was about Detective McGill that was important to you in your case that you heard at the Carchidi trial.

A Yes, ma'am. As I said, they refused to give the name of the detective to Carchidi's attorneys, which were my attorneys. And they argued this point. And Judge Greenberg said that the Commonwealth would have to give up the name of the detective. They did this. Mr. McGill was then put on the stand, and under cross-examination admitted that McGrath had never told him the same statement that he related at my trial.

BY MS. GELB:

Q Now let's get on with what happened subsequent to this trial, the Carchidi trial. Did you have an understanding with your attorneys with respect to the filing of appeals to the Supreme Court of Pennsylvania?

A Yes, ma'am.

Q What was your understanding?

A Well, at the day of sentencing, Mr. DiBona had asked for what they called a Coram Nobis hearing. He said the reason for this was that he wanted to have this hearing to show after discovered evidence and to

make the record clear, in the event that we were to be denied, to go up to the State Supreme Court. And he wanted this on the record.

Q Was it your understanding with Judge DiBona that he would file appeals to the Supreme Court of Pennsylvania on your behalf?

A Definitely. Yes, ma'am.

Q Was it your understanding that he did in fact file such appeals to the Supreme Court?

A I was under the impression that he did, yes, ma'am.

Q And did there come a time when you were advised by Mr. DiBona that he had become a Judge and could no longer represent you?

A Yes.

Q Do you recall when that was?

A I had first read it in the newspaper, to be quite frank about it, and I immediately wrote a letter to his office congratulating him and asked him to send me all important materials such as trial notes and such.

Q Did you hear from Judge DiBona with respect to that?

A No, I did not.

Q Did you write to anyone else in connection

with your appeals?

A I wrote to Mr. Peruto numerous times. I can't tell you how many times.

Q And what did you ask Mr. Peruto to do?

A I asked Mr. Peruto what was going on with the case. I asked Mr. Peruto to please send me notes of testimony. I asked Mr. Peruto to please send me the notes of the Coram Nobis and all notes pertaining to my case.

Q Did you ask Mr. Peruto to do anything in connection with your appeal in your case?

A I asked Mr. Peruto to please get on the ball and get me into the courtroom. Yes, ma'am.

Q What did you mean by get into the courtroom?

A Make sure the briefs were in and make sure he argued my case.

Q Did you at any time have any understanding with Mr. Peruto that he had no obligation to file briefs in your behalf?

A No, ma'am. As co-counsel that was my understanding.

Q Did you at any time have any understanding with Mr. Peruto that he was relieved of any obligation to argue your case before the Supreme Court of Pennsylvania?

A No, ma'am.

Q To your knowledge was a brief ever filed in your behalf?

A No, ma'am, it was not.

Q Did Mr. Peruto ever tell you that he was going to file a brief in your behalf?

A He did.

Q To your knowledge, were your cases ever argued before the Supreme Court of Pennsylvania?

A No, ma'am, they were not.

Q Is it your understanding that no argument was had on your appeals?

A That's correct.

Q Did you ever consent to giving up your right to argue cases and file a brief to the Supreme Court of Pennsylvania?

A No, ma'am. No way.

Q Now did there come a time when you became aware of the fact that your cases were not argued before the Supreme Court?

A Yeah, like seven years later. After the decision was handed down is actually when I found out that no briefs were filed. I had no knowledge whatsoever until that time that there wasn't.

Q Did you write to either of your attorneys to

ask for copies of the brief?

A On numerous times.

Q Did you ever receive a copy of any brief?

A I did not.

Q Did you ever discuss with Mr. Peruto exactly what issues you wanted him to raise on the appeal to the Supreme Court?

A Yes, ma'am, we discussed it.

Q And can you tell the Court at this time what some of those issues were?

A Yes. At the time my idea, being limited as I was, was the conspiracy issue; the fact that we didn't have Detective McGill to testify, Mr. Mike Hessian, the people under the window, the whole bit, myself; the Judge's charge. More than anything else I was, quite frankly, quite bitter.

Q You indicated to your attorneys that you were not satisfied with the charge of the Court; is that right?

A It was outrageous.

Q Did you ask your attorneys to sign certain errors that you believed occurred in the charge of the Court?

A I certainly did.

Q Did you ever discuss with Mr. Peruto or write to Mr. Peruto anything with respect to closing remarks of the Assistant District Attorney who tried your case?

A Yes, ma'am.

Q Did you ever ask him to raise that issue before the Supreme Court of Pennsylvania?

A Yes, ma'am. I told him that I thought the District Attorney was way out of line. And he was speaking of something -- things -- no evidence whatsoever in the case.

Q What were some of those things, Mr. Sullivan?

A Things of the nature -- like in one particular stage in the summation he said that Mr. Sullivan called on the telephone to Carchidi who was laying in wait somewhere. And I don't know how he has that knowledge to say who I called and when I did.

Q Did anything like that take place during the course of the trial?

A As evidence, no, ma'am.

Q Did you ever discuss with Mr. Peruto the assigning of error on appeal your right to challenge the array of the Grand Jury?

A Yes, that was discussed after I became aware

of this fact. And in fact, that was done before trial and we were denied. And the District Attorney made it a point to say that I raised it six years later, which is not so.

Q Now, Mr. Sullivan, did you yourself ever file any proceedings that in any way related to any delays of your appeals?

A Yes, ma'am, with the help -- what's the term, jailhouse lawyer -- I filed a habeas corpus against Mr. Peruto and Mr. DiBona in the Federal District Court.

Q Do you recall when that was?

A No, ma'am. Sixty-something. I don't know.

Q Did you file any other proceeding in the Federal Court?

A I filed that habeas corpus, and it was my understanding it was given to Judge John Morgan Davis. And I received a reply back from Mr. Davis saying it was denied for not exhausting State remedies, that he had no jurisdiction because he was privately retained counsel. He said if nothing is done within 90 days that you may refile. I appealed that decision to the Third Circuit and was denied. I waited the 90 days. Nothing was done. I filed another Petition along with his Order and more information. I can't relate what

that was now. I received a notice back saying that it was denied. I appealed that, I believe, but I'm not positive on that. I believe I appealed that also to the Third Circuit, and I was denied, but I'm not sure if it was taken any further than that.

Q Mr. Sullivan, did you have the benefit of counsel to prepare and argue any of the proceedings that you've just relayed to us were prepared?

A No, ma'am.

Q This was all done then by yourself, without counsel?

A Me and -- excuse the term -- jailhouse lawyer.

Q A jailhouse lawyer, but not a member of the Bar of the Court; is that right?

A No, ma'am.

Q Did you yourself ever file any document with the Supreme Court of Pennsylvania in connection with your appeal?

A Yes, ma'am. What I did, like I said, I kept writing for briefs and I never got any replies.

THE COURT: Kept writing whom?

THE WITNESS: I kept writing Mr. DiBona and Mr. Peruto. And after Mr. DiBona became a Judge, I stopped correspondence.

And I kept writing to Mr. Peruto asking for briefs and information pertaining to this matter. I never received any replies. I took it upon myself and wrote the District Attorney personally and asked him would he please send me the brief. Did he file it in the State Supreme Court. I didn't hear anything on that. I wrote again. I can't remember the specific dates. I didn't hear any reply. I waited so long and I wrote another letter to the District Attorney's office. On that second occasion I then received a letter back and the brief, the District Attorney's brief, stating that it was just filed. And it had the date there, June 18th, I believe it was.

BY MS. GELB:

Q You're now making reference to the brief of the Commonwealth?

A That's correct. And that is how I received it. Upon receiving that brief, naturally, I read it and went over it and I seen it was filled with inconsistencies and things that never even occurred. Fortunately, I had a visit. My wife came up and I explained this to her. I said, "As soon as you get home

you call Chuck. You tell him --"

THE COURT: Chuck, meaning who?

THE WITNESS: Mr. Peruto. I'm sorry. I said, "Immediately get him to get ahold of this brief and to file a rebuttal." She did this. I received word back the next day. Fortunately, I get my wife's mail the next day. I received word back that she spoke to Chuck on the phone and Chuck said that the brief was just delivered to his desk, he hasn't gone over it, and won't be able to do so for a week.

Q What brief was that?

A This is the Commonwealth's brief.

BY MS. GELB:

Q Now did you do anything subsequent to that?

A Yes. I learned through the jailhouse lawyers I only had five days in which to put a rebuttal in. I immediately set out and found me a person and we sat down and relayed the untruths in the brief, wrote my own brief up, had it notarized and sent it to the Supreme Court and sent Mr. Peruto a copy.

Q Now when you say you found yourself a person, are you, once again, referring to a jailhouse

lawyer?

A Yes.

Q You're not referring to a member of the Bar?

A No, ma'am.

Q So that you submitted what you call a rebuttal?

A Yes, ma'am.

Q And you submitted that to whom?

A To the State Supreme Court.

Q Why did you do that?

A Because it was obvious that Mr. Peruto wasn't going to do it.

Q Now what was there in the brief of the Commonwealth that made you very anxious to submit a rebuttal?

A Well, I can name some specifics.

MR. LUNKENHEIMER: Objection, your Honor. I don't think the motivation is relevant --

THE COURT: I'll overrule it. He says he can't remember.

BY MS. GELB:

Q Is that your answer? Did you say you can't remember?

A No. I beg your pardon. I said I can name some specifics.

THE COURT: Go ahead.

THE WITNESS: There was one issue in there that said -- on the inquest issue it said something -- I can't quote it verbatim. It said something about there was no objections made at the inquest. And I pointed out that Mr. John Patrick Walsh did so in fact make a 30, 40 minute speech to the Medical Examiner why this wasn't -- why I shouldn't have been held. I pointed out at one point in their brief where they said Anthony DiPasquale was standing on the pavement as a look-out. This was stated in the State Supreme Court's decision verbatim out of the District Attorney's brief. It says, "Anthony DiPasquale was on the pavement as a look-out." I pointed this out that there was no such testimony at any time in three trials. There was no testimony of Anthony DiPasquale even being alive. And we pointed all this out. And there was some other issues that I can't remember.

BY MS. GELB:

Q Those were some of the issues you had in your rebuttal?

A Yes.

Q Do you know when the decision came down from the Supreme Court of Pennsylvania on your case?

A I think it was December of 1971, late December.

Q Now subsequent to that, Mr. Sullivan, was the petition for reargument filed timely?

A After the decision?

Q After the decision came down.

A Yes, ma'am, there was.

Q And did Mr. Peruto have anything to do with that petition for reargument?

A No, ma'am.

Q Who filed the petition for reargument?

A Marilyn J. Gelb, Esquire.

Q To your knowledge was there also a subsequent petition for leave to file another petition to reargue to file in the Supreme Court of Pennsylvania?

A Yes, ma'am, there was.

Q And did Mr. Peruto have anything to do with the filing of that petition?

A No, ma'am, he did not.

Q And who filed that petition?

A Marilyn J. Gelb and Mr. James M. Moran.

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Q You indicated on direct examination you never retained any lawyer. Why, then, were you represented by Mr. DiBona?

A I thought I explained that, sir. We had the conversation that I had no money, my family had no money, and I related to Mr. Carchidi and Mr. DiPasquale that it was my preference to have Mr. Walsh represent me, and I didn't have a sufficient fund to pay him. They both told me that they had already spoken to Mr.

Peruto and said that Mr. Peruto and his partner -- that was the term that was used -- would handle the case and handle the whole three of us and I wasn't to worry about it. So it was taken care of.

Q So you did not select Mr. DiBona to be your lawyer?

A I did not.

Q In other words, when Mr. DiBona and Mr. Peruto testified that you chose Judge DiBona --

A I thought you were speaking of the time they were engaged. The only understanding I had was that these gentlemen was going to represent the three of us. Who was going to represent me, I have no knowledge, as I stated. It just so happened that I never said anything about Mr. DiBona being older and more experienced. It just happened to be that this is the way it turned out. It was no choosing of drawing straws in a hat.

Q So at trial when Mr. DiBona did all the examination you didn't realize which one of the two lawyers was going to do the examining?

A You mean until the day we went to trial? No, sir, I had no idea. They were both present and they both participated in the trial. They both asked questions in the trial. Mr. Peruto examined prospective

jurors in the trial; Mr. Peruto delivered the penalty phase of the trial; Mr. Peruto sitting next to me was a participant in the trial, back and forth, writing notes and things of that nature, speaking to Mr. DiBona, speaking to me.

Q So you considered their role as equals?

A Oh, yes, sir. Yes, sir. I had no other thought.

Q Now you indicated that you did not pay any fees for this legal representation.

A No, sir, I did not.

Q And your family did not.

A To the best of my knowledge.

Q Did the Union pay the fees?

A Not to my knowledge.

Q You have no idea how these men were paid at all?

A No, sir. Only speculation. There was something about chances were sold and friends' donations and things of that nature. And I understood they worked for nothing, practically. In fact, they made that statement at trial, that they was working for, to use an Italian phrase, "meatballs."

Q You stated that your job at the Union was Health and Welfare official?

A Yes, sir.

Q You collected delinquent accounts?

A Yes, sir.

Q That's what's known in the parlance as an enforcer?

A No, sir.

Q When you collected these --

A I'd like to explain that, sir. Under the Union contract, the Teamsters Union contract, each employer pays so much per man, life insurance, Health and Welfare and pension. This was all done on paper, sir. There is no monies involved whatsoever. After you become four weeks delinquent, our Health and Welfare office will issue what they call the delinquent sheet. I would get this delinquent sheet with the list of the companies that were delinquent and I, in turn, would take the ones that were in the arrears more than others. I would go there, speak to their manager, and tell them would they kindly send in a check to the office and the report of the men that were working there. I had no dealings whatsoever with any money whatsoever.

Q You just went and told them to pay up or else?

A I didn't go to them to pay up. I told them to obey the contract.

Q Or else?

A That's all. And sometimes they didn't pay, sir.

Q And then what did you do to them?

A Nothing. Just went back again and told them to please pay it.

Q So in other words you never collected anything?

A Personally, no. It was mailed into the office with forms.

Q So when you say you collect delinquent accounts, you didn't collect delinquent accounts?

A Technically I didn't, no, sir.

Q Now you've testified about Michael Hessian a great deal. Was Michael Hessian a friend of Micky McGrath's?

A To the best of my knowledge, he was.

Q Was he good friend?

A To the best of my knowledge, very good.

Q In fact, wasn't he involved in getting Micky McGrath a job at the Union?

A To the best of my knowledge he was. I have no proof of this. This is the understanding I have, yes, sir.

MS. GELB: Is Micky a nickname?

MR. LUNKENHEIMER: You recall Micky is the name the witness used on direct examination in reference to Francis McGrath, Frank McGrath. Since the witness had called him Micky, I thought I'd call him Micky also.

BY MR. LUNKENHEIMER:

Q Did you have any reason to think that Michael Hessian as a friend of McGrath's would try to protect Mr. McGrath?

MS. GELB: Objection.

THE COURT: Overruled.

THE WITNESS: I had no knowledge one way or another. I never gave it a thought.

BY MR. LUNKENHEIMER:

Q Was there a power struggle going on in the Union at the time?

A No, sir, there was not.

Q So when Mr. Peruto said yesterday there was a power struggle going on, he was wrong?

A At that particular stage he was wrong, yes.

Q Were you aware that Mr. McGrath had body-guards?

A Oh, yeah. Not aware personally. Hearsay

I was aware.

Q And were you informed by your lawyers that Michael Hessian was very scared to testify?

A No, sir, I was not.

Q Were there other witnesses that you know of that were scared to testify?

A Not to my knowledge, no, sir.

Q You say you became aware that Mr. Gorey and Mrs. Janda may have had the dinner meal at a place other than the place testified to?

A Yes.

Q How did you learn of that information?

A This was brought about by Mr. Christine, the investigator, and he told me. And I don't know what his job is or how he goes about it, but he had located a waitress that was a waitress at the Brewery Tavern, and he went and spoke with her and had information from her that Mrs. Janda and Mr. Gorey had dinner in there Friday evening.

Q Did he also tell you that several members of the Union had had dinner there that evening?

A No, he did not.

Q Did he tell you that they would not testify that Gorey and Janda were present there?

A No, he did not.

Q How did you learn that the people outside the building were going to testify -- or did not hear any shots?

A This was just common knowledge. This went on, you have to remember, sir, July, August -- some six, seven months later when the inquest was held and the trial was held a year later. And all these people are members of the Local. And I guess you can imagine that there was talk all over the Local.

Q But you weren't at the Local at that time, were you?

A Beg your pardon?

Q You weren't at the Local at that time?

A At that time? At what time, sir?

Q After the inquest and prior to your trial, six months after the crime.

A I was at the Local up until the inquest, sir.

Q Was the inquest six months after the crime?

A Whatever it was, from June after the trial.

Q The inquest, you said, was November, I believe.

A November 3rd, yes, sir, 1966.

Q So that six months after the crime you were in jail, Holmesburg Prison.

A Yes, I was.

Q How did you get common knowledge from the Union while you were at Holmesburg Prison?

A Mr. DiBona made an opening statement to the jury, and in his opening statement he related to the fact that there was -- I believe the term was six, seven, eight people standing directly under the window.

Q So you didn't know of this prior to Mr. DiBona's opening statement?

A No, I did not, no.

Q Now isn't it a fact that at trial Detective Houston testified that you said you didn't do it and you wanted to speak to your lawyer?

A He testified to that, yes, sir.

MS. GELB: If your Honor pleases, I would object. And it was the same basis for objection that Mr. Lunkenheimer was using, the record will speak for itself. And that wasn't what Detective Houston said at all.

MR. LUNKENHEIMER: She was allowed to ask her questions as to what Detective Houston said to him and was allowed to go into it quite at great length, including a three-party conversation --

THE COURT: Well, whatever was in the record at the trial is here before us. And I understand it's all going to be incorporated by reference.

MS. GELB: Absolutely. The basis of my objection is the inaccuracy of the question. I wouldn't object otherwise.

MR. LUNKENHEIMER: If it's inaccurate, the witness just adopted it. He said, yes, that it's true. Now I strongly object to counsel changing the witness's mind or testifying.

THE COURT: Well, I'll overrule the objection. But don't ask questions in the future that are concerning matters of record unless the witness contradicts them.

BY MR. LUNKENHEIMER:

Q Was Mr. Rome available at the time of trial?

A Yes, he was.

Q In fact, Mr. Rome testified, did he not?

A I believe on two occasions.

Q And after Mr. Rome came to the jail, you did not make any further statement to the police on advice of counsel; isn't that correct?

A You mean when he came to 8th and Race?

Q Right.

A The whole thing was that we went into a little room and there was something like maybe roughly six cops, seven cops, I don't know. And we all sat down at a long table, Mr. Rome, myself and the police detectives. And they started to ask questions. Mr. Rome did all the answering. And during this proceedings, after maybe an hour or so, the detectives would look at me, because I was just disgusted with all this rigamarole that was going on, and they said, "Look, you don't need him. You don't have to have counsel. You can get rid of him and save the Union money." And this went on continually.

Q And at no time did you make any statement?

A I did not, to the best of my knowledge. Now that's a long time ago.

Q And no statement of admission of any kind was introduced against you at trial, was it?

A Not to the best of my knowledge. I don't know.

MS. GELB: Once again, would you note my objection, your Honor, because whether a statement was in admission or not is a legal conclusion, and I don't know whether this witness is competent to answer --

THE COURT: Well, just ask him if any statement was offered in evidence.

MR. LUNKENHEIMER: I'll withdraw the question, your Honor.

BY MR. LUNKENHEIMER:

Q Now for you to contradict the testimony of Detective Houston, it would have been necessary for you to take the stand; isn't that correct?

A I imagine it would be, sir.

Q And you in fact did not take the stand?

A As it turned out I didn't, no, sir.

Q Now also when you said on direct examination that Mr. Rome could testify that it was not the truth when Detective Houston said, "I leaped up and demanded an attorney and said I wasn't there," in fact, Mr. Rome wasn't there at the early part --

A I was relating to the fact that Mr. Rome can stand up and state clearly that Detective Houston said I gave him nothing but my name and address, there was no further conversation and that was the end of it. And he could so testify to that fact.

Q But Mr. Rome was not there through the entire period of your conference with Detective Houston?

A No, sir.

Q Now you indicate that you wanted to testify.

A Yes, sir.

Q Did Mr. Peruto want you to testify?

A No, sir.

Q And did Mr. DiBona want you to testify?

A In the beginning he did, yes, sir.

Q And who made the final decision, which of the three of you?

A I had nothing to do with the decision. It was given to me point blank. And Mr. Peruto, after like I say hours of discussion, Mr. Peruto said something to the effect of, "Look, we're the attorneys. You don't know anything about law"-- I'm not quoting him verbatim, I'm using my own language -- and your life is in my hands and we're out to protect it, and you're not to worry, that you'll be acquitted and we're assured that you'll be acquitted. And I said, "Look, you got it, you got the ball, carry it."

Q And you agreed with them that there wasn't much evidence against you?

A I agreed to go along with their decision as an attorney. I have no knowledge of the law.

Q Was it your feeling that there was no evidence against you?

A I still have no way of knowing that.

Q You were present and you didn't hear any of the evidence?

A I heard all of the evidence.

MS. GELB: Your Honor, I object to this whole line because he's arguing with the witness. These are legal conclusions he's talking about, whether this is legal, whether there is sufficient evidence against him.

BY MR. LUNKENHEIMER:

Q In fact, no evidence at trial was produced to place you directly in the room with the two decedents, was there?

A No, sir.

Q And you were aware of this at the time of this discussion?

A I was aware of it, certainly. I was aware of it because I was never in the room, because I was not in the room.

Q Well, in that sense you knew that the Commonwealth hadn't proved that you were in the room, correct?

A I said that I knew that I wasn't in the room, sir.

Q But you had also heard the testimony.

A I heard the testimony, yes, sir.

Q And wasn't it discussed between you and your lawyers that the Commonwealth hadn't proved that you weren't in the room?

A It was discussed between me and my lawyers that there was insufficient evidence to convict, and the Judge agreed.

Q You told us on direct examination that Judge DiBona went over the testimony with you. Didn't he tell you that there was no evidence that you were in the room?

A No. Mr. Peruto stated that he was of the opinion that the evidence was insufficient to get a conviction.

Q That is not responsive to my question.

A Maybe I don't understand your question.

Q On direct examination you said Judge DiBona went through all the testimony with you before anything else was discussed.

A I said that they both went through the testimony, Mr. Peruto.

Q They went through the testimony however?

A They did, sir. Yes, sir.

Q And in going through the testimony, did they

discuss that no evidence was produced to put you in the room?

A Not in them exact terms, no, sir.

Q So when you say they went through the testimony, they didn't discuss all the testimony.

A But they didn't use them words that you're using, sir. They just went through each witness. They didn't mention about anything about room, to the best of my knowledge. Took each witness, went along in sequence, and when they reached the end they said there was no evidence involved in this case and the evidence was wholly insufficient to get a conviction and the Judge agrees. That's the exact words. Nothing about rooms or no rooms.

Q They didn't discuss anything about the fact that nobody could show that you had a gun that day?

A To the best of my knowledge, they did not. This was brought up at trial. And they didn't mention it in reviewing the evidence, no, sir.

Q Or that nobody saw you with either of the two victims?

A They never discussed this in the Judge's chambers, as it were.

Q Or that there were other means of access

into the building?

A They never discussed that, no, sir.

Q Did they ever discuss with you McGrath's testimony?

A Yes. They said it was just unbelievable.

Q Did you agree with them, that his testimony was unbelievable?

A Yes, because I knew he wasn't telling the truth.

Q Did you agree with them that there was no evidence that you had committed this crime?

A I have no knowledge of that. I'm not that well-schooled.

Q I asked you whether you agreed with them.

A I don't know how to answer that and be honest about it.

Q You sat there mute throughout this whole discussion?

MS. GELB: Your Honor, I object at this time. He's arguing with the witness

THE WITNESS: You're not getting through to me.

THE COURT: No, Ms. Gelb, I'll overrule that.

THE WITNESS: You're not getting

through to me. Phrase it different. I just don't understand.

BY MR. LUNKENHEIMER:

Q Did you say anything during this discussion?

A You mean the discussion we had in the Judge's chambers?

Q Right.

A I had a quite a lot to say, yes, sir.

Q If you had no knowledge about any of these matters, what were you talking about?

A I was talking about what I introduce as evidence. I said, "Why don't you bring the people that was standing under the window?"

Q You just said you don't know what evidence is.

A I have common sense, sir. Logic.

Q Could you use your common sense to tell us whether or not you agreed with them that there wasn't any evidence against you.

A I'll try, if that's what you mean.

MS. GELB: Objection, your Honor. Even the Supreme Court couldn't decide that.

THE COURT: Overruled.

THE WITNESS: I agreed that there

was no evidence in that respect.

BY MR. LUNKENHEIMER:

Q So you do know what evidence is?

A No, sir, I don't.

Q So all your discussions on direct examination --

A -- was on logic.

Q That wasn't evidence?

A No. In other words, what you're asking me, sir, is my logical thinking, and my common sense showed me there was no evidence. Now as a matter of law I don't know whether there is evidence or not.

THE COURT: All right, let's get on with something else.

BY MR. LUNKENHEIMER:

Q You stated on direct examination that you know nothing about firearms.

A That's correct.

Q Did you ever make any statements to any other people that in fact you did know what firearms were?

A No, never.

Q You never Shirley Ann Davis that you owned a gun?

A No, sir. I never owned a gun in my life.

MS. GELB: Of course, if your Honor pleases, I would object to this. This isn't even part of the trial at this point on cross-examination.

THE COURT: No, but he can ask this question. This was brought out on direct examination.

THE WITNESS: No, sir.

BY MR. LUNKENHEIMER:

Q And you never owned a gun in your life?

A No, sir, never.

Q Were there guns kept at the Union?

A To the best of my knowledge there wasn't.

Q Was there members of the Union who had guns?

MS. GELB: I object.

THE COURT: I'll sustain that objection.

BY MR. LUNKENHEIMER:

Q Did you have access to any guns?

A No, sir.

Q John Rispo carry a gun?

A I haven't the slightest idea.

Q Do you know who John Rispo is?

MS. GELB: Your Honor, I would

object to this entire line of questioning --

THE COURT: Just a minute. I'll sustain that objection.

BY MR. LUNKENHEIMER:

Q Have you ever seen a gun in your life?

A Have I ever seen a gun in my life? Yeah, in the television and movies and on a police officer.

Q Did you ever in real life except on a police officer?

A To the best of my knowledge, yes. In a store, sporting goods department.

Q Were you ever present at any time when Judge Barbieri stated that there was no sufficient evidence?

A No, I was not.

Q Did you ever discuss with counsel and the other defendants, or was a discussion ever held in your presence what the other defendants defenses would be?

A No, sir.

Q Did you ever discuss with the defendants themselves what their defenses would be?

MS. GELB: Objection.

THE COURT: No, I'll overrule that.

THE WITNESS: No, sir.

BY MR. LUNKENHEIMER:

Q Were you present in Carchidi's trial?

A I said I was in City Hall, sir.

Q Were you in the courtroom?

A No, sir, I was not.

Q So on direct examination when I objected that you weren't present to any testimony in Carchidi's trial and you said, "Oh, yes, I was," you were not telling the truth?

A No, sir, I misunderstood you. I understood you to mean that I was here. I was in conference all along that trial. They would come upstairs and we had discussions. I thought that's what you meant.

Q You said you had conversations during that trial. Were they talking about the case?

A Yes, sir.

Q Were they talking about their defense?

A No, sir. They were speaking at that particular stage of the witnesses that were appearing at that particular trial.

Q So you don't know other than by conversations in the cell room what actually occurred at the Carchidi trial?

A That's correct.

Q You don't know who testified for either side?

A Well, I know what I was told.

Q You know Carchidi testified?

A Yes, I do.

Q And do you know whether anyone else testified for the defense?

A Yes, Nick Vanore, Michael Hessian, Esther Snyder, Detective McGill, Carchidi. And that's the best I can remember.

Q In fact, the Commonwealth called Esther Snyder as a witness, did they not?

A I don't think so.

Q She testified against you at your trial.

A She didn't testify against me, she testified in the trial, sir.

Q As to certain facts in relationship to the switchboard.

A Yes, sir. They were also proven false.

Q And Detective McGill testified for the Commonwealth in your trial?

A No, he did not.

Q He did not testify at all?

A Didn't even know who he was.

Q Now you've indicated that after the trial you learned of Tony Salvatore's existence.

A Yes.

Q Did you know him prior?

A I knew him as a member of the Union, yes, sir.

Q But you didn't know he was a witness to anything; is that correct?

A At the time of trial?

Q Yes.

A No, sir, I did not. No.

Q And did you ever discuss specifically with Judge DiBona who was testifying?

A No, sir, I did not.

Q He was testifying.

A No, sir. I had now knowledge of it.

Q Now if I put this in time, did you ever discuss this with Judge DiBona about his testifying after the trial itself?

A No, sir.

Q So as far as you know Judge DiBona doesn't know what Tony Salvatore could have offered at the trial, that it's something you learned separately --

A I learned that much later, yes, sir.

Q Now you've indicated at several times that you're not conversant with the law, you're not in fact a lawyer; is that correct?

A That's understandable, yes, sir.

Q Did you know what counsel meant on direct examination about oral argument?

A Yes, sir.

Q And how did you know that?

A Well, I know oral means to speak out, sir.

Q And do you know what proceedings are in a case in appeal to the Supreme Court of Pennsylvania in the Commonwealth?

A Very, very vaguely.

Q So you don't know how the Supreme Court handles its cases?

A I haven't the slightest idea.

Q And you did not discuss specifically how the case would be presented on appeal, merely that you wanted it appealed?

A No, sir. I did discuss it, and I'll explain why. I said there's a lot of things that read on paper that have to be explained. I said you should go there before the Court and explain to the Court so they don't have to take it on paper and have to guess at it.

Q So you do know that you can go before the Court?

A My common sense tells me, sir, that an oral argument means to speak out. And I know that as half

an intelligent a human being.

Q So you know that there is oral argument before the Supreme Court?

A I do know, yes, sir.

Q Were you also told also on oral argument that the Commonwealth would be able to describe the brutal nature of this crime to the Court?

A No, sir, I was not.

Q No one ever suggested to you that perhaps it was better on paper to have the nature of this death presented than to have the Commonwealth --

A No way.

Q Let me finish my question.

A Yes, sir.

Q -- describe to the Court the horror of this particular crime?

A No, sir.

Q Did anyone, in terms of your testifying at trial, specifically discuss the embarrassment you personally might have if you were put on the stand?

A I don't understand you, sir.

Q In your discussions about whether you would testify at trial.

A You're going back to the trial now, am I correct?

Q Yes. Did anyone discuss whether or not you wanted to be personally embarrassed on the stand by things in your private life?

A If I understand you right, I'll try to answer it. I don't know if you're correct in your question. I said that Mr. Peruto said that if I were to take the stand that Mr. Sprague would drag my private life out, and he said that that would be very embarrassing not only to me but to my wife.

Q And there were such things in your private life --

MS. GELB: Objection.

THE COURT: I'll overrule that.

THE WITNESS: Quite frankly, I don't think I done any more than you probably done.

MS. GELB: I withdraw the objection.

MR. LUNKENHEIMER: Well, I'll let the record note that that's not correct.

THE WITNESS: That's your opinion.

MR. LUNKENHEIMER: No, that's my knowledge.

BY MR. LUNKENHEIMER:

Q So there were things in your private life

that some people might consider embarrassing?

A I didn't consider it embarrassing because I said I didn't care and I had nothing to hide.

Q Did you speak to your wife about whether she cared?

MS. GELB: Objection.

THE WITNESS: I did not.

THE COURT: Overruled.

BY MR. LUNKENHEIMER:

Q Did you speak to Shirley Ann Davis about that?

MS. GELB: Objection.

THE COURT: That I'll sustain.

MR. LUNKENHEIMER: Your Honor, I believe it goes to a motivation in terms of whether he took the stand or not.

THE COURT: Well, we have no indication at this point about who Shirley Ann Davis is.

BY MR. LUNKENHEIMER:

Q Mr. Sullivan, who is Shirley Ann Davis?

MS. GELB: Objection.

THE COURT: Well, what is the basis for this?

MS. GELB: Your Honor, Shirley

Sullivan - Cross

Ann Davis --

MR. LUNKENHEIMER: Your Honor, we've had much testimony at this hearing about personal embarrassment to the defendant. And I wish to show that there was an individual in Mr. Sullivan's life whose existence might cause personal embarrassment to him and his wife and maybe even to that person as the grounds for the advice given by counsel that such embarrassment may exist.

THE COURT: I'll overrule the objection.

MS. GELB: Of course, he already testified to that, your Honor. And I object to him going beyond that.

THE COURT: Proceed.

BY MR. LUNKENHEIMER:

Q Do you know a Shirley Ann Davis?

A Yes, sir, I do.

Q And are you the father of two of her children?

MS. GELB: Objection.

THE COURT: Well, I don't know that that is material. Is it, Mr. Lunkenheimer?

MR. LUNKENHEIMER: Your Honor, that, I believe, is the cause of the embarrassment. That is the heart of why it might be embarrassing.

THE COURT: I'll overrule the objection.

MS. GELB: If your Honor pleases, would you hear argument on this issue? I don't think that this Petitioner at this time can be forced to answer that question.

THE COURT: You see, he's testified that he wanted to take the stand. Now such motives that would cause him either to take the stand or not take the stand have to be material. They have to be material to this issue.

MS. GELB: And he's testified as to what his motive was in wanting to take the stand.

THE COURT: You may answer. I'll overrule it.

BY MR. LUNKENHEIMER:

Q Are you the father of Miss Davis's two children?

A To the best of my knowledge I am.

Q And you had fathered these children prior to the time of this trial; is that correct?

A Yes, sir.

Q Were your counsel aware of that fact?

A I believe they were, sir, yes.

Q Did you have occasion to speak with Miss Davis at any time during the trial?

A No, sir, I did not.

Q Did you speak to her after your arrest and prior to trial?

MS. GELB: If your Honor pleases, I would object to this.

MR. MORAN: I would like to object too. If your Honor please, I understand your Honor's purpose in letting this in, to show perhaps the motive why the defendant not testify. But it seems to me that any counsel would advise him that this would not be admissible in a trial of this case. That he had a meretricious relationship with any woman of some kind or another, how could that conceivably be admitted into evidence if he took the witness stand?

MR. LUNKENHEIMER: Your Honor, I don't think it's proper for counsel to

be arguing the law as to the theory what counsel may or may not have done.

THE COURT: You see, it's not a question of whether it's admissible or not, it's a question of his motives for either taking the stand or not taking the stand. And, it's for that purpose that I am allowing the testimony to proceed. So I'll overrule the objection.

THE WITNESS: May I say something, your Honor?

THE COURT: Well, you can explain your last answer, if you wish.

THE WITNESS: My motive for not taking the stand was strictly based that there was no evidence that had nothing to do with Shirley Davis. It had nothing to do with Shirley Davis, because when it was brought to my attention that my personal life would be pointed before the Court, I had no objection to it. I said, "Fine. It has nothing to do with the case." And I was willing to take the stand and drag my personal life in front of the stand because it had nothing to do with what I was on trial

for.

BY MR. LUNKENHEIMER:

Q Did you discuss that at all with your wife?

A I did not.

Q So you don't know whether or not she would have been embarrassed by this?

MS. GELB: If your Honor please, I object to that. This has nothing to do with this.

THE COURT: I'll sustain that.

BY MR. LUNKENHEIMER:

Q Have you ever at any time filed a complaint against either or both of your lawyers in this case, based on the handling of your case, with the Disciplinary Board?

A No, sir, I did not.

Q In spite of the fact that you filed two petitions in the Federal Court in regards to your appeal, you never filed such a complaint?

A Quite frankly, I knew nothing about any disciplinary complaints.

Q You did know how to file a petition in the Federal Court.

A No, I didn't. I went and got someone that did know.

Q And who was that?

MS. GELB: Objection.

THE COURT: No, I'll overrule that.

THE WITNESS: If I remember correctly his name was John Brenner.

BY MR. LUNKENHEIMER:

Q And he was a fellow prisoner?

A Yes, he was.

Q Now have you ever read a copy of the Supreme Court opinion in your case?

A In my case? Yes, sir, I have.

Q Yes?

A Yes.

Q And you're aware that in that opinion, in the first footnote, they mention the fact that you filed a pro se brief in this case?

A It's mentioned in there.

Q Is it also mentioned in that opinion that your counsel filed a brief?

A Yes, sir, it is.

Q Now you said at many times that you're not conversant with the law and you've indicated you have to go to jailhouse lawyers for assistance.

A Yes, sir.

Q Given that fact, how did you know to object to the charge of Judge Barbieri to the jury?

A Because it didn't sound right; because he was using terms that weren't stated. He was using terms that told the jury that I was guilty. Like I say, you don't have to have knowledge of the law to see and listen to what somebody is saying.

Q Did you put that in your pro se brief to the Supreme Court?

A I truthfully don't remember, sir. I'd have to look at it.

Q Did you put anything in your brief in regards to Mr. Sprague's closing argument to the jury?

A I don't recall, sir. I'd have to look at it. Quite frankly, what I done, maybe to save a lot of time, I answered his brief. So I didn't put really anything of my own. In effect, what we were doing, was when I took the District Attorney's brief, the Commonwealth's brief, I went through that and on my memory told the fellow that was filling out the paper for me what occurred, what didn't occur, what was true, what wasn't true. He wrote it in his language, and that's what we sent in. In other words, I didn't put a brief in on any allegations that I had myself. So, therefore, that would be admitted because there was never a brief

filed on that.

Q Did you come to the Union hall that day, the day of the murder, with Gregory Carchidi?

A I came to the Union hall alone.

Q And while you were there, did you see Gregory Carchidi?

A In the course of the day, sir?

Q Well, in the evening, after six o'clock.

A After six o'clock I did. Yes, sir.

Q And you saw Frank McGrath there as well?

A Francis McGrath I did, yes, sir.

Q And Anthony DiPasquale?

A No, sir, I did not.

Q Did you see John Gorey there?

A I seen John Gorey get out of his car. And I would have to explain this to you. This is a parking lot here, and the building is here. And there is just a tiny little street. You park your car here. And I seen Mr. Gorey get out of this car with this young lady, who I didn't even know. Now when they come toward the building to enter there is a doorway. When you come towards the building you would then be out of my view. And when they come towards the building and got out of my view, that is the first and last time that I saw Mr.

Gorey or the young lady.

Q And you were seated in the second floor at that time?

A Yes, sir.

Q And you were in Amoroso's office?

A No, sir, I was in my office. It was used. The term "Amoroso's office --"

Q That's how they described it at trial.

A Well, it's not true. The office belongs to me, Amoroso and quite a few other people.

Q But in the trial notes they kept referring to Amoroso-Venore office. That's what you're talking about?

A That's true. But I want to make sure that it was my office also.

Q And you saw Frank McGrath cleaning up?

A I did, sir. In the room with me, sir.

Q And you saw him empty the waste basket?

A No, I did not.

Q Did you have any discussion with him?

A Yes, we had a conversation.

Q And did he relate to you that John Gorey's life had been threatened?

A No, he did not.

MS. GELB: Objection, your Honor.

And I would object to any further questioning. I have let Mr. Lunkenheimer go along here --

THE COURT: I don't see what this has to do with the witness, Mr. Lunkenheimer.

MR. LUNKENHEIMER: Your Honor, he's made denial of presence on direct examination. I think I have a right to examine today --

MS. GELB: He hasn't denied his presence.

MR. LUNKENHEIMER: Your Honor, he's made a denial of his own presence at certain times, and I should be allowed to examine the circumstances surrounding this particular time.

MS. GELB: If your Honor please, he's not denied his own presence there. The only question seems to be exactly when these persons met their deaths. That's the large issue here.

THE COURT: I'll sustain your objection to the last question.

BY MR. LUNKENHEIMER:

Q When did you leave the building?

A Approximately?

MR. MORAN: Objection, your Honor.

THE COURT: That I'll overrule.

THE WITNESS: 7:18, 7:20, somewhere in that nature.

BY MR. LUNKENHEIMER:

Q And by what means, which exit did you go out of?

MS. GELB: Objection, your Honor.

THE COURT: Overruled.

THE WITNESS: I don't know if you're familiar with the building. There is a back stairs that leads down into the parking lot, and that is the exit I used.

BY MR. LUNKENHEIMER:

Q That's the same stairs you came up from the parking lot to the second floor?

A I really don't recall if I came in that way or I came in the front earlier that day. I don't know.

Q That exit is on the west side of the building next to the parking lot?

A Parking lot is here, building is here. Yes, sir.

Q And there is a little alleyway between the buildings; is that correct?

A Just a little street, yes, sir.

Q And you were going out the same direction that you saw Gorey and Janda come toward the building, same general area?

MR. MORAN: Your Honor, I think we're getting into trying the merits of this case now, rather than just the question on this particular hearing today.

THE COURT: All right. I know nothing in the direct examination on this point, so I'll sustain that.

BY MR. LUNKENHEIMER:

Q When you left the building, did you walk away or drive away?

MS. GELB: Objection, sir.

THE COURT: That I'll overrule. He can answer that.

THE WITNESS: I got in my car and I drove away, sir.

BY MR. LUNKENHEIMER:

Q And when you left the parking lot, which way did you go?

MR. MORAN: Objection, sir.

THE COURT: Well, now, how is this material?

MR. LUNKENHEIMER: Your Honor, he's already testified on direct examination that he learned there were witnesses outside the building at about this time. And I feel I should have the right to examine.

MS. GELB: If your Honor please, that wasn't his direct testimony. He testified that he was later at trial advised. And, as a matter of fact, Mr. McGrath testified at trial that there were witnesses outside.

MR. LUNKENHEIMER: May I have a right to find out why he doesn't know when he left the building?

THE COURT: You can ask him that first, before you get to that question.

MR. LUNKENHEIMER: Your Honor, my question goes directly to which way he would go and his access to seeing these people. He's testified learning about eight or ten people outside the Union hall.

THE COURT: I don't recall that he said he saw them.

MR. LUNKENHEIMER: Right. And I have the right to ask him why he did not see them.

MS. GELB: If your Honor pleases, the question is then these persons were there. There is no testimony on direct examination that they were there at any time when Mr. Sullivan could see them.

THE COURT: All right, I'll permit you to ask the question. But you just can't go on a fishing expedition. Just this question I'll permit.

Which way did you go after you left the building?

THE WITNESS: Towards 2nd Street.

BY MR. LUNKENHEIMER:

Q In other words, you took a right hand turn out of the parking lot?

A Right.

Q Did you bring your vehicle to a stop prior to entering Spring Garden Street?

A I would imagine I did. I don't know. I would imagine, because there's a little hump.

Q Did you notice anyone standing on the sidewalk in front of the Union hall?

A I didn't notice anything, sir. In other words, I just pulled my car out, made my right turn and continued on my way, sir.

Q Did anyone else leave the building with you at the same time?

A No, they did not.

Q When you left the building, were there any other vehicles in the parking lot?

MR. MORAN: Objection, your Honor.

MS. GELB: Objection, your Honor.

THE COURT: I'll overrule that.

THE WITNESS: There was quite a few vehicles on the parking lot.

BY MR. LUNKENHEIMER:

Q When you left, did you speak to anyone just prior to leaving?

A Yes, I did, sir.

Q To whom?

A I spoke to Carchidi and Mr. McGrath.

Q And they were still in the building?

A Yes, they were, sir.

Q Was there a black '61 Buick with a dented right side in the parking lot?

MR. MORAN: Objection.

THE WITNESS: I couldn't tell you that, sir.

THE COURT: That I'll sustain.

BY MR. LUNKENHEIMER:

Q Did you see anyone else on the second floor of the building, where you were, other than Carchidi and McGrath?

A No, sir, I did not.

Q And you saw no one outside the building at the time you left?

A To the best of my knowledge I didn't. No, sir.

Q Did you ever have a discussion with Nick Frank, Ed Mills, Teddy Williams or Paul Kramer after the day of the murder?

A About what?

Q About the murder itself. Do you know who these people are?

A I recognize some of the names, yes, sir.

Q And you were nodding, no, to my question of having a discussion?

A I wasn't nodding anything. I got an itch.

THE COURT: Can you answer the question? Did you have discussions with these people?

MR. MORAN: Objection, your Honor.

THE COURT: Overruled.

THE WITNESS: We had discussions, as I have stated, your Honor, the fact that such a thing occurred. It was general discussion in the Local Union. Yes, sir, I had discussions with just about everybody, sir.

BY MR. LUNKENHEIMER:

Q So you may have had discussions with these four individuals?

A I may have had, yes, sir.

Q And do you have any recollection of what those discussions were?

MR. MORAN: Objection, sir. We don't know who these four individuals were, how these people relate in any way to the issue being tried here today. There's been no testimony of these other people.

THE COURT: Did these people testify at trial?

MR. LUNKENHEIMER: No, sir, your Honor, they did not. However, there has

been much testimony about individuals standing outside the Union hall and the fact that such individuals could testify in the defendant's behalf. And I intend to show in my own case that they will not testify that way. And I'm asking about these individuals.

THE COURT: Well, you can ask him whether he intends to call any of these four people. That you can ask.

MR. MORAN: We'll ask that right now. The answer is, no.

MR. LUNKENHEIMER: Fine, your Honor. I have no further questions of this witness.

THE COURT: You have no further questions now?

MR. LUNKENHEIMER: That's correct.

THE COURT: Redirect.

REDIRECT EXAMINATION

BY MS. GELB:

Q With respect to Detective McGill and his testimony, Mr. Sullivan, when did you first become aware of the existence of a Detective named McGill who

might have anything to offer in the way of your case?

A At the Carchidi trial.

MR. LUNKENHEIMER: Objection, your Honor. I did not ask any questions about Detective McGill. The matter was covered on direct examination.

MS. GELB: Your Honor, I wrote a note exactly when he asked about Esther Snyder and Detective McGill.

MR. LUNKENHEIMER: I asked who testified at the Carchidi trial. I didn't ask anything else. He just stated who. And I said was he called by the Commonwealth and he said "I don't know."

THE COURT: This isn't a game. I'll overrule the objection.

THE WITNESS: At the Gregory Carchidi trial.

BY MS. GELB:

Q At that time did you have any conversation with either of your lawyers about the possibility of your trial being opened in some way to let in some testimony by Detective McGill?

A I beg your pardon. I don't understand you.

Q I'll try to rephrase it, Mr. Sullivan. Did

you talk to Mr. Peruto about the possibility that Detective McGill may be called to testify in some other proceeding related to your case as a result of his testimony in the Carchidi trial?

A It was my understanding that they were going to use him to testify in what they call the Coram Nobis, after discovered evidence.

Q And Detective McGill's testimony was the after discovered evidence?

A That is correct.

Q Now with respect to the possible testimony of someone named Tony Salvatore, were you present in the courtroom when Mr. Peruto testified that he recalled something about having known Rita Janda was called at 7:40 P.M.?

A Yes, I heard him say that.

Q Did you know at the time of your trial?

A No.

Q When did you first become aware of that?

A Mr. Moran, some time ago.

Q Did either of your lawyers at any time discuss with you the possibility that a description of the crimes that were committed might be so inflammatory before the Supreme Court that it might somehow affect the Supreme Court and your appeals?

A Yes, ma'am. Mr. Peruto told me, as he stated yesterday, he was up to see me, I believe, in December of 1969 or 1970. I'm really not positive on that. He was taken there by my brother and my uncle, because I'd been writing and writing and writing. And somehow or other they got ahold of him and took him up. And he got ahold of me and said, "John, we're going to put the appeals in. They're being printed," or something of that nature. I said, "Chuck, don't forget. I want you to argue this case." He said, "I don't feel as though I should argue the case. This may sound silly to you. I hate to use this term," he said, "but they are all Republicans and I don't think it would do us any good to argue." And I said, "I don't see where that makes any sense." After Mr. Peruto left, I went down and had a visit with my brother and uncle and I related to them what happened. They told me that Mr. Peruto said it would do no good to argue the case because the families would be sitting in the front row and the Supreme Court would rule against me.

Q After you had this conversation with Mr. Peruto, what did you say to him?

A I never seen Mr. Peruto any more until I seen him here yesterday.

Q And what did you say to him that day, if

anything?

A I told him I wanted the case argued before the Court so it could be explained.

Q Did you consent to his suggestion not to argue for any reason?

A No way.

Q Do you recall what words you used to him?

A I'm not going to repeat them words here.

Q Did Mr. Peruto indicate to you that he would do what you directed him to do?

A Mr. Peruto gave me the proverbial kiss of death and said, "Don't worry about it," and walked out.

Q Now just one other thing. When you left the Union Headquarters on June 17th, 1966, what exit did you leave?

A There is only one exit.

Q Is there a parking lot there?

A There is a parking lot with poles, yes, ma'am.

Q And was there testimony at your trial as to how many entrances and exits there were to the building on that parking lot?

A Yes, ma'am.

Q And how many are there?

A I don't know offhand.

Q Is there more than one?

A About six or seven, I guess. I don't know.

MR. LUNKENHEIMER: Your Honor, I object. I don't think the witness is responding to the question.

MS. GELB: This was brought out on cross-examination.

MR. LUNKENHEIMER: Your Honor, he's not responding, because the question was exits to the parking lot rather than exits to the building. And his answer is exits to the building itself in toto.

THE COURT: He wants to know whether you're answering to the parking lot or the buildings.

BY MS. GELB:

Q There is one exit from the parking lot; is that right?

A That's correct.

Q And how many exits and entrances from the building?

A Roughly six or seven.

Q So it's possible for persons to be walking in and walking out of entrances or exits to that building without approaching the exit from the parking

lot, isn't it?

A Definitely.

MR. LUNKENHEIMER: I object.

THE COURT: Overruled.

BY MS. GELB:

Q And that can be done by foot or by car?

A Not by car, no, ma'am.

Q Entering or leaving the parking lot?

A You can park the car on the street and enter the building without taking access to the parking lot exit, yes, ma'am. I thought you meant can you drive the car in the building. You can't do that.

Q I didn't mean that. I meant the persons can leave the building by many entrances or exits.

A Without using the parking lot.

Q To enter the parking lot without using that one entrance from the parking lot; is that right?

A That's right.

MS. GELB: I have no further questions.

THE COURT: Now, Ms. Gelb and Mr. Moran, do you have any further testimony to offer?

MR. MORAN: At this time, no, sir.

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EXCERPTS FROM TESTIMONY OF G. FRED DIBONA, ESQUIRE
MAY 15, 1974

IN THE COURT OF COMMON PLEAS

FIRST JUDICIAL DISTRICT OF PENNSYLVANIA

CRIMINAL TRIAL DIVISION

COMMONWEALTH	:	NOVEMBER TERM, 1966
V.	:	
JOHN SULLIVAN, Defendant	:	NUMBERS 190 and 193

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POST CONVICTION HEARING ACT PETITION

VOLUME II

- - -

Room 784, City Hall
Philadelphia, Pennsylvania

- - -

May 15, 1974

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BEFORE: HONORABLE ETHAN ALLEN DOTY, A.J.

PRESENT:

KARL LUNKENHEIMER, ESQUIRE
ASSISTANT DISTRICT ATTORNEY
FOR THE COMMONWEALTH

JAMES M. MORAN, ESQUIRE and
(MS.) MARILYN J. GELB, ESQUIRE
ATTORNEYS FOR THE DEFENDANT

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G. FRED DiBona, Judge, Court of Common Pleas, Philadelphia, Pennsylvania, previously sworn.

DIRECT EXAMINATION

BY MR. LUNKENHEIMER:

Q Judge DiBona, I don't believe at the last occasion, when you had testified, you were qualified as to your prior experience in the criminal law. Could you indicate to the Court when you became a member of the Bar.

A 1941.

Q And between --

MS. GELB: May I ask what the relevancy of this examination is, your Honor?

THE COURT: Well, there is a charge of ineffective assistance of counsel. And I assume this is to show background as to that.

MR. LUNKENHEIMER: Yes, your Honor.

BY MR. LUNKENHEIMER:

Q And between 1941 and 1966, did you try criminal cases?

A Yes, sir, criminal and civil.

Q And prior to the trial of John Sullivan, did you try any first degree murder cases?

A Yes, sir.

Q And had you tried jury trials prior to that time?

A Yes, sir.

Q Could you estimate an amount?

A You mean jury trials?

Q The number of jury trials.

A Several hundred, I'd say. Four, five hundred jury trials over the years.

Q And could you estimate an amount of trials in which the charge was murder?

A Five or six of them, I guess.

Q Now, your Honor, whose ultimate decision was it as to the calling of defense witnesses in the case of John Sullivan?

A Well, the ultimate decision was that of Mr. Sullivan.

Q Now I believe you testified the last time --

THE COURT: This was as to what?

MR. LUNKENHEIMER: Calling of defense witnesses.

BY MR. LUNKENHEIMER:

Q I believe you indicated at the last hearing that Mr. Sullivan stated he did not wish to testify; is that correct?

A That was the ultimate decision, yes, sir. We had a long discussion about it, as I testified.

Q Now after he made that decision, was the decision made as to whether to call other witnesses?

A Yes, sir.

Q And who made that decision?

A Counsel did with Mr. Sullivan.

Q And was the decision not to call any other witnesses in any way predicated on the decision to protect the other two defendants in this case, Anthony DiPasquale and Gregory Carchidi?

A No, sir.

MR. MORAN: With all due respect, your Honor, I think he should limit it to Mr. DiBona. There were two counsel involved in this case, and I don't want Mr. DiBona answering for Mr. Peruto.

THE COURT: No, I don't think that was intended by the question.

MR. MORAN: That's the way it was phrased.

THE COURT: Only as to this witness.

MR. LUNKENHEIMER: I'll rephrase the question.

BY MR. LUNKENHEIMER:

Q Was your decision in this matter in any way predicated on a decision to protect the other two defendants in this case?

A My decision as to what?

Q As to whether to call other witnesses other than Mr. Sullivan.

A No, sir, it was not.

Q Was this decision made by you individually, or was it made jointly?

A Well, the decision of not calling Mr. Sullivan as a witness, is that what you're referring to?

Q No, I mean the other witnesses after Mr. Sullivan.

A The decision was made jointly by counsel and the client.

Q Also, your Honor, were you present at the Carchidi trial?

A Yes, sir.

Q Now other than Michael Hessian, who had been called as a Commonwealth witness, and Gregory Carchidi, who was the defendant, did the defense present any other civilian witnesses, I mean non-police witnesses?

A I don't recall any.

MS. GELB: Objection. It's a relevancy question here.

THE COURT: Well, of course, the record will speak for itself, will it not, whether any other witnesses were called.

MS. GELB: I withdraw the objection.

THE WITNESS: I don't recall any others. No, sir.

BY MR. LUNKENHEIMER:

Q Then no witnesses, civilian witnesses, were presented at the Carchidi trial that would have in any way affected the defense of Mr. Sullivan?

MS. GELB: Objection, your Honor. This is a question of whether Judge DiBona remembers any civilian witnesses were called who might have affected the defense of Mr. Sullivan.

THE COURT: Rephrase your question.

BY MR. LUNKENHEIMER:

Q Do you recall, your Honor, whether any witnesses were called that would have affected the defense of John Sullivan?

A I don't recall any civilian witness with the exception of Mr. Hessian, who was called in the Carchidi trial.

MR. LUNKENHEIMER: I have no further questions, your Honor.

CROSS-EXAMINATION

BY MS. GELB:

Q But there were police witnesses who were called, were there not, Judge DiBona?

A My recollection is that's right.

Q And some of those witnesses included Detective Duffy, Detective McGill; is that correct?

A I think that's correct.

Q And those Detectives' names were unknown to you during the course of the Sullivan trial; isn't that correct, Judge DiBona?

A My recollection is that they became known to us some time towards the end of the Sullivan trial. They were not at the time we started the trial, that's correct.

Q And what did you do when those names became

known to you, sir?

A Well, I don't specifically recall at this time.

Q Do you recall at this time, Judge DiBona, in what connection those names became known to you?

A No. It was brought out on cross-examination somewhere toward the end of the Commonwealth's case. I don't recall the specifics of it. I haven't read this record since the date of the trial, since right after trial when I reviewed it for brief purposes.

Q Do you recall, Judge DiBona, that during the course of the Sullivan trial that you and your co-counsel made a request upon the Commonwealth to produce the names of any police witnesses who may have made notes with respect to the testimony of Mr. McGrath who was the star witness for the Commonwealth?

MR. LUNKENHEIMER: I'd object, your Honor. I believe the record would speak for that.

THE COURT: No, this is a little different. I'll overrule that.

THE WITNESS: I have a recollection of something along those lines, yes.

BY MS. GELB:

Q And do you recall that the names of those

police witnesses were not made known to you in response to your request during the course of the Sullivan trial?

A That's correct.

Q Did you participate in the decision to call Detective McGill and Detective Duffy in the course of the Carchidi trial?

A Yes, I did.

Q And is it your recollection that those two officers testified in a way that would contradict the testimony of Mr. McGrath?

MR. LUNKENHEIMER: Objection, your Honor. One, it's outside the scope; two, it's not relevant. I asked only who was called and not the content of their statements. I don't believe the facts of what he said are a critical issue.

THE COURT: We want all the facts. I'll overrule the objection.

THE WITNESS: In the context of the Carchidi trial they did weaken somewhat the testimony of Mr. McGrath.

BY MS. GELB:

Q Do you have any recollection, Judge DiBona, whether in fact there were any other police witnesses

who were called during the course of the Carchidi trial?

A Not without looking at the record.

Q If I were to suggest to you that Detective McGowen may have been a witness in the course of the Carchidi trial, does that in any way refresh your recollection, sir?

A There were several other detectives. Their names I do not recall, nor does your question refresh my recollection. But if I could have the index sheet of the witnesses I could clarify it for you.

THE COURT: Now you said in the Carchidi trial it did weaken the testimony of one of the detectives?

THE WITNESS: No, the McGrath testimony.

THE COURT: The McGrath testimony?

THE WITNESS: Yes. He'd given some statements prior to the alleged official statement, which contradicted some details, his subsequent statement

BY MS. GELB:

Q And the notes that were made with respect to Mr. McGrath's oral statements were the notes that were made available to you during the course of the Carchidi trial; is that correct?

Yes.

MR. LUNKENHEIMER: Objection, your Honor. One, it's repetitive; two, it's not relevant. The issue of what was presented at the Carchidi trial is not relevant as to what occurred at the John Sullivan trial. And Post Conviction relief can only flow from what occurred at the John Sullivan trial. Now it's already been stated by both Judge DiBona and Mr. Peruto that evidentiary rulings that may have been different at the second trial than the first trial permitted certain other evidence to come in that they had not received before. And that's as far as we go on Post Conviction.

THE COURT: I think he's got a point.

MS. GELB: Your Honor, this goes to the issue of whether or not the Commonwealth had certain evidence which it would not disclose to the defense and which, if disclosed, would be favorable to the testimony of the defense. And that was the basis of the question.

THE COURT: Well, you've already

got the testimony. I'll sustain the objection.

MR. MORAN: I realize it's out of order. May I ask a question, your Honor?

THE COURT: Well, I assume there is no objection. Proceed.

MR. LUNKENHEIMER: I have no objection.

BY MR. MORAN:

Q Judge DiBona, if you had been aware of the testimony of Officers McGovern, Houston, McGill and McGowen in the Sullivan case, would you have put them on in that case if you were aware of their evidence, their testimony?

MR. LUNKENHEIMER: Objection, your Honor. It calls for speculation.

THE COURT: No, I'll overrule that. He can answer that.

THE WITNESS: Mr. Moran, this raises one of my philosophies about the law. Your caught in a situation where if I bring suit against John Smith for a hundred dollars I can then take his deposition, take the deposition of everybody in the City of Philadelphia, issue interrogatorie

on just about everyone I wanted and get the information. In the criminal law, unfortunately we don't have that. Had the information been available to me -- and now my recollection is that their testimony was such that it would have had some relevancy in the Sullivan trial -- had I had that testimony, had it been given to me, had my request for it been honored I would have considered calling them at that trial.

Q Isn't it a fact, sir, in the Carchidi case they contradicted the Commonwealth's chief witness, who was McGrath; is that correct?

MR. LUNKENHEIMER: Objection again, your Honor.

THE COURT: I'll sustain that. That you can argue. Both sides can argue at the conclusion of the case.

MR. MORAN: I have a couple other questions.

BY MR. MORAN:

Q I think you said earlier in answer to a question posed by the District Attorney, that John Sullivan made the decision as to whether or not he would testify. Is that what you said?

A Yes, sir.

Q Now you wanted him to testify; is that correct?

A I did, sir.

Q Was it Mr. Peruto who did not want him to testify?

A Mr. Peruto argued against his testifying. Whether he was doing it as a Devil's Advocate or not I wasn't sure. But we had a long discussion with John Sullivan, at which time I took the position he should testify.

Q Mr. Peruto took a position he shouldn't?

A That's correct.

Q Was it after this hour or hour and a half conversation that the three of you had, that Mr. Sullivan decided, okay, he'd go with Mr. Peruto, he wasn't going to testify?

A I think he said at that time he would not testify. And the next morning, my recollection is, he said he definitely made up his mind that he would not testify.

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EXCERPTS FROM TESTIMONY OF GREGORY CARCHIDI
AUGUST 6, 1974

IN THE COURT OF COMMON PLEAS

FIRST JUDICIAL DISTRICT OF PENNSYLVANIA

TRIAL DIVISION - CRIMINAL

COMMONWEALTH : NOVEMBER TERM, 1966

v. :

JOHN SULLIVAN : No. 190 and 193

POST CONVICTION HEARING ACT PETITION

June 13, 1974
August 6 and 8, 1974

Rooms 784 and 636, City Hall, Philadelphia, Pa.

BEFORE HONORABLE ETHAN ALLEN DOTY, A.J.

PRESENT:

KARL LUNKENHEIMER, ESQ.,
Assistant District Attorney,
for the Commonwealth

MARILYN GELB, ESQ.,
JAMES M. MORAN, ESQ.,
for the Defendant

FILED
SUPREME COURT
OCT 7 1974

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DIRECT EXAMINATION

BY MR. MORAN:

Q. Mr. Carchidi, were you also arrested in the killings of Rita Janda and John Gorey?

A. Yes, sir.

Q. Were you also represented by Mr. Charles Peruto?

A. Yes, sir.

Q. And Mr. Fred DiBona?

A. Yes, sir.

Q. Did you eventually go to trial as a result of that arrest?

A. Yes, sir.

Q. Were you tried before or after Mr. Sullivan?

A. After.

Q. During the course of the Sullivan trial, were you in jail?

A. Yes, sir.

Q. And during the course of the Sullivan trial, were you brought down to City Hall?

A. Yes, sir.

Q. And at that time did you have conversations with Mr. Sullivan and Mr. Peruto and Mr. DiBona?

A. Yes, sir.

Q. And were you aware, sir, that a Commonwealth witness by the name of McGrath made certain statements that you had said something to him the night of the shooting?

A. Yes, sir.

Q. Were you questioned by Mr. DiBona and Mr. Peruto with respect to whether or not in fact you had made those statements to Mr. McGrath?

A. Yes, they questioned me.

Q. What did you say to Mr. Peruto and Mr. DiBona?

A. I never made them statements.

Q. You said then that the Commonwealth witness lied?

A. Yes, sir.

Q. Did you offer to testify on behalf of Mr. Sullivan?

A. Yes, sir.

Q. Did you testify on behalf of Mr. Sullivan?

A. No, sir.

Q. Why did you not testify in behalf of Mr. Sullivan?

A. They didn't think it was necessary.

Q. When you say they didn't think it was necessary, who didn't think?

A. Mr. Peruto and DiBona.

Q. They represented you and they represented Mr. Sullivan?

A. Yes.

Q. And they told you not to testify?

A. They didn't think it was necessary.

MR. MORAN: Cross examine.

CROSS EXAMINATION

BY MR. LUNKENHEIMER:

Q. These statements allegedly made by you to Mr. McGrath, at the time they were made was Mr. Sullivan present?

A. No, sir.

Q. Was he in the building at that time?

A. I believe so.

Q. Had you and he arrived together?

MR. MORAN: Objection, your Honor.

THE COURT: I'll overrule that.

BY MR. LUNKENHEIMER:

Q. Had you and he arrived at the building together?

A. No, sir.

Q. Had you seen him in the building?

A. Yes, sir.

Q. When did you leave --

MR. MORAN: Objection, your Honor.

THE COURT: What do you mean by building?

MR. LUNKENHEIMER: Local 107 union headquarters.

MR. MORAN: If your Honor please, I respectfully object again, sir. This goes beyond the scope. He was offered for a specific reason.

THE COURT: Well, but it concerns, or it may concern the statement, so I'll overrule it.

THE WITNESS: At the same time Mr. McGrath left. I don't know exactly what time it was.

BY MR. LUNKENHEIMER:

Q. And that was after hearing shots fired?

A. I don't know what they were. I heard noises.

Q. Now what did you say to McGrath at that time?

A. I don't recall saying anything outside of, "Let's get the hell out," or, "Let me get the hell out," something like that. I don't recall. All I wanted to do was get out.

Q. Had you talked to Mr. McGrath about what he was doing in the building on that night?

A. Yes. I was sent there purposely to look for him because he hadn't shown up for work for a few nights and Mr. Hession asked me to notify him that they wanted to see him in the front office first chance he got.

Q. And did you tell him that?

A. Yes, sir.

Q. Did you have a discussion with him about whether or not he should be cleaning the building that day?

A. I don't recall, because we usually did it on Fridays or Saturdays or Sundays, whenever they had the time.

Q. Didn't you tell him to come back some other day because it was going to be a big meeting and pointless to clean today?

A. I don't recall.

Q. Did you see Mr. Gorey and Miss Janda enter the building?

A. No, sir.

Q. Did Mr. DiBona or Mr. Peruto give you a more specific reason why they didn't think it was necessary for you to testify?

A. Well, we had conversations during release and Sunday lunch, and from all indications that they

told me and that I got from some of the sheriffs that it was no trial, it was a joke, and that he would be acquitted and nothing else was needed. Some of the sheriffs said this also.

Q. Were you present when Mr. Sullivan told Mr. DiBona he didn't want to testify?

MR. MORAN: Objection, your Honor.

THE WITNESS: No, let me answer that, please.

MR. MORAN: I withdraw it.

THE WITNESS: To the contrary, he fought like hell to testify.

BY MR. LUNKENHEIMER:

Q. That was in your presence?

A. Yes, in my presence.

Q. Were you ever interviewed by the detectives in the Philadelphia Police Department in relationship to this case prior to your case coming to trial?

MR. MORAN: Objection, your Honor.

THE COURT: I'll overrule that.

THE WITNESS: I think a few of them did talk to me in 107, or they tried to have an interview with me. And I told

my attorney at the time and he said any time they wanted me he would take me in and sit down with me.

BY MR. LUNKENHEIMER:

Q. Did you ever tell any representatives of the Philadelphia Police Department or the District Attorney's Office prior to trial what you said in Mr. McGrath's presence on the day of the shooting?

A. Did I ever tell any of the detectives?

Q. Either a detective or a D.A.

A. I've never had the interview. Never wanted to take me in with my attorney, only by myself.

Q. No one ever spoke to you even in the presence of your counsel?

A. No, not that I can recall.

Q. Did you ever ask your counsel to inform the Philadelphia Police Department what you knew of what happened that day?

A. No.

Q. Did you ever relay to anyone other than Mr. Peruto and Mr. DiBona what you knew to have occurred that day from your own personal knowledge?

MR. MORAN: Objection, your Honor.

THE COURT: Overruled.

THE WITNESS: Not that I can recall. I never discussed with anyone.

BY MR. LUNKENHEIMER:

Q. Did you testify in your own defense at the trial?

A. Yes, sir.

Q. Were any other witnesses called in your defense who were outside the building that day?

A. I can't recall. I believe there was. I don't remember his name, but I think he worked in the dues office collecting dues, the monthly dues.

MR. LUNKENHEIMER: No further questions.

REDIRECT EXAMINATION

BY MR. MORAN:

Q. Mr. Carchidi, on the night of the killing did you say to Mr. McGrath, "Get the hell out of here, keep your mouth shut"?

A. No, sir.

Q. And you were willing to testify to that in the Sullivan case?

A. Yes.

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EXCERPTS FROM TESTIMONY OF A. CHARLES PERUTO, ESQUIRE
AUGUST 8, 1974

IN THE COURT OF COMMON PLEAS

FIRST JUDICIAL DISTRICT OF PENNSYLVANIA

TRIAL DIVISION - CRIMINAL

COMMONWEALTH : NOVEMBER TERM, 1966

v. :

JOHN SULLIVAN : No. 190 and 193

POST CONVICTION HEARING ACT PETITION

June 13, 1974
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Rooms 784 and 636, City Hall, Philadelphia, Pa.

BEFORE HONORABLE ETHAN ALLEN DOTY, A.J.

PRESENT:

KARL LUNKENHEIMER, ESQ.,
Assistant District Attorney,
for the Commonwealth

MARILYN GELB, ESQ.,
JAMES M. MORAN, ESQ.,
for the Defendant

FILED
SUPREME COURT
OCT 7 1974

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A. CHARLES PERUTO, Attorney-at-Law, duly sworn.

DIRECT EXAMINATION

BY MS. GELB:

Q. Mr. Peruto, you testified earlier in this case with respect to the absence of a brief in the Supreme Court of Pennsylvania on the appeal of John Sullivan's case. Now can you tell this Court whether you ever had a conversation with James Crawford of the District Attorney's office with respect to the filing of a brief in this case?

A. I don't recall any conversation with James Crawford.

Q. Can you recall whether at any time on or before November 26th, 1969 you met with Mr. Crawford in the office of the Prothonotary of the Supreme Court and discussed at that time with him the

submission of this case without oral argument?

A. No. I don't see how that could have been. He might be confused with another case if he so says, because I had nothing to do with the appeal.

I worked with Judge DiBona on the case. There were three defendants. The three defendants had the election as to whom they wanted to be represented by. Mr. Sullivan elected to be represented by Fred DiBona and the other two elected to be represented by me. I took it that it was Judge DiBona's responsibility to follow through with briefs, appeals, etcetera, and I would offer whatever assistance I could. But I had nothing to do with the filing of any brief. To this day I don't ever recall ever having seen a brief. I understood that he was taking care of that. And there was no such conversation that I can possibly recall with Mr. Crawford or anyone else.

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EXCERPTS FROM TESTIMONY OF GREGORY CARCHIDI
AT MEDICAL EXAMINER'S INQUEST
NOVEMBER 3, 1966

In re: :
:
Inquest by :
JOSEPH W. SPELMAN, M.D. :
Medical Examiner, :
City of Philadelphia, :
in the deaths of :
JOHN JOSEPH GOREY :
:
and :
:
RITA JOSEPHINE JANDA :

Philadelphia, Pa., November 3, 1966

Room 453, City Hall

Before: JOSEPH W. SPELMAN, M.D.,
Medical Examiner,
City of Philadelphia.

Allen Kaplan
OFFICIAL COURT REPORTER
COURT OF COMMON PLEAS No. 3
357 CITY HALL PHILADELPHIA, PA. 19107
MUnicipal 6-3743

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GREGORY CARCHIDI (430 West Browning Road, Bellmawr, New Jersey), sworn.

BY MR. SPRAGUE:

Q. Mr. Carchidi, we have a bench warrant for you for your not being here at ten o'clock. Why weren't you here?

A. I respectfully refuse to answer anything that might tend to incriminate me on the grounds of the Constitution of Pennsylvania and of the United States.

Q. Now, Friday, June 17, 1966, were you in Local 107 Union Hall, 105 Spring Garden Street, in the evening?

A. I respectfully refuse to answer the question on the grounds that it might tend to incriminate me, according to the Constitution of Pennsylvania and the United States.

Q. On the particular evening, did you see John Sullivan?

A. I respectfully refuse to answer the question on the grounds that it might tend to incriminate me, according to the Constitution of Pennsylvania and of the United States.

Q. On that particular evening, did you happen to see Anthony DiPasquale?

A. Same answer.

Q. I don't know what that answer is.

A. I respectfully refuse --

Q. Try to read it.

A. I respectfully refuse to answer the question on the ground that any answer may tend to incriminate me, relying upon my rights under both the Constitution of Pennsylvania and the Constitution of the United States.

Q. On that particular evening, did you have a conversation with either -- well, we will take it one at a time -- with John Rispo, with regard to the killing of Gorey?

A. I respectfully refuse to answer the question on the ground that any answer may tend to incriminate me, relying upon my rights under both the Constitution of Pennsylvania and the Constitution of the United States.

Q. On that particular evening, did you have a

conversation with Francis Marino?

A. I respectfully refuse to answer the question on the ground that any answer may tend to incriminate me, relying upon my rights under both the Constitution of Pennsylvania and the Constitution of the United States.

MR. SPRAGUE: May he be excused from the stand at this point? But to remain here, as we have a bench warrant for his arrest.

MEDICAL EXAMINER: Yes.

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GREGORY CARCHIDI, recalled.

BY MR. SPRAGUE:

Q. Mr. Carchidi, when you were questioned by Mr. Session, did you deny to him that you had been in the building at 105 Spring Garden Street on June 17, 1966, at the time of the homicide?

MR. GABRIEL: I object, if your Honor please, first, because Mr. Sprague is not reporting accurately what the last witness said. And secondly, because my client has already entertained his privilege earlier.

MR. SPRAGUE: Your client can always decide to change his mind, Mr. Gabriel.

Will you repeat the question?

MEDICAL EXAMINER: Would you rephrase the question, Mr. Sprague?

BY MR. SPRAGUE:

Q. Mr. Carchidi, did you deny to Mr. Session that you were at the premises of 105 Spring Garden Street at the time of the murders?

MR. GABRIEL: Now, of course, I object to the question again.

MEDICAL EXAMINER: I think that is a proper question.

BY MR. SPRAGUE:

Q. Will you answer that, please?

A. I respectfully decline on the grounds that it might tend to incriminate me.

MR. SPRAGUE: That is all. Any questions, your Honor?

MEDICAL EXAMINER: No further questions.

MR. SPRAGUE: Mr. Carchidi, you wait in the courtroom.

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Excerpts from Transcript of Trial (In-Chambers) Discussion) (June 12 and 13, 1967) [481]

FOURTH DAY OF TRIAL

IN THE COURT OF OYER AND TERMINER, GENERAL JAIL DELIVERY, AND QUARTER SESSIONS OF THE PEACE, IN AND FOR PHILADELPHIA COUNTY

COMMONWEALTH : NOVEMBER SESSIONS, 1966

vs. :

JOHN SULLIVAN : NOS. 190 & 193, MURDER

Monday, June 12, 1967

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453 City Hall, Philadelphia, Pennsylvania

BEFORE: ALEXANDER F. BARBIERI, J., and a jury.

APPEARANCES:

(As before noted.)

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[621]

MR. DI BONA (interposing): Assuming --

THE COURT (interposing): All right. Let's see what Mr. Sprague says to this.

MR. SPRAGUE: In my opinion, Your Honor, they are not entitled to any statement made by either of the other two defendants prior to the homicide; in other words, prior to the investigation by the authorities. That would just be in the realm of evidence that the Commonwealth may or may not have for the purpose of proving its case. With regard to admissions or statements, or anything said after the homicide to the investigating authorities, that is what is being prepared.

THE COURT: How about --

MR. DI BONA (interposing): Or, to anyone, sir.

THE COURT: How about Sullivan? Just a minute. Now, let me get your position clear as to Sullivan, the defendant on trial before me. Are you saying that you don't think they should have statements made by Sullivan prior to the homicide, that you have in your files?

MR. SPRAGUE: In my opinion, Your Honor, they are not entitled to it, however, and I would

[622]

refer the Court back on the record where I stated and I advised the Court and defense Counsel of any and all statements of Sullivan that I was aware of before and after the homicide, and I also pointed out what the substance of the oral conversations was, even though it occurred prior to the homicide. I gave that out gratuitously. I didn't think they were entitled to it, but, to avoid any argument, I, nonetheless, gave it.

With regard to the statements of the other two defendants, I am not going to be gratuitous in that sense, because I just don't think they are entitled to them.

THE COURT: I don't know the answer right at the moment, but let me think about it. I have your motion. We will take it under advisement.

MR. SPRAGUE: Well, Your Honor, just so the Court is aware, the next witness who is going to testify will relate substance and some conversation that he had not only with the defendant who is on trial, but will, as well, relate conversation that he had with one of the co-defendants.

[623]

MR. DI BONA: Now --

THE COURT (interposing): Is that admissible?

MR. DI BONA: Now we get into a double area. First, I want those statements before he testifies. Secondly, sir, these statements made by Carchidi to McGrath--and, that's who he is referring to--are inadmissible, sir.

THE COURT: Who is McGrath?

MR. DI BONA: McGrath is the janitor who is their next witness. Now, the argument will be made to Your Honor, I am sure, that the statement of Carchidi is going to be--its admission will be--moved on the theory of a conspiracy.

My answer to that is twofold, sir. In the first place, we are not trying a conspiracy. First, the conspiracy Bill is not before this jury. Secondly, sir, my second answer is this, sir: There has been no showing of any conspiracy between Sullivan and Carchidi--absolutely none to the moment. I think Mr. Sprague will agree to that.

THE COURT: How about principals?

[624]

Suppose they are principals present at the same time? I don't know whether it is going to be established or not. But, would that make a difference?

MR. DI BONA: Even if they are conspirators, sir, a statement made by one is no longer admissible, under the Shad (sic) case, against the other, unless--well, I will stop right there. The statement of one is not admissible against the other. Sir, now, getting to the second issue, the statement of Carchidi is not admissible against Sullivan, except on the basis of conspiracy. My answer to that is twofold: (1) There is no conspiracy charge; secondly, sir, even assuming for a moment you did have that, then they would have to show the existence of a conspiracy in order that the statement become admissible.

Now, I am going to anticipate Mr. Sprague's argument, and this is the argument used by every prosecutor in the history of mankind, I guess.

"We will later show the conspiracy, and, if we don't, then Your Honor can strike it out."

Now, I say, sir, you don't do it that way.

[625]

They have got to show the conspiracy, first, the corpus of the conspiracy, first, in order that the statement become admissible. We don't want to have it left hanging.

Now, Mr. Sprague should at this moment be asked, sir, if this is his theory of admissibility. He should be asked what evidence he has of the existence of any conspiracy, what evidence he intends to offer in this case to show the existence of a conspiracy, because I say to Your Honor that their usual tactic is to put the statement in, and then later argue: "Well, the statement shows a conspiracy."

Now, you can't put the cart before the horse. He has got to at this point tell Your Honor what evidence there is of the existence of conspiracy, what evidence he intends to offer specifically, and not on the generality: "We will show it during the course of the case."

I think we are entitled to know now what evidence of conspiracy exists in this case.

THE COURT: Let me get around to Mr. Sprague, then. Do you agree that in order to bring out the statements--are these statements

[626]

tending to implicate someone else, or implicate the defendant? They tend to implicate the defendant, I take it? Is that correct?

MR. SPRAGUE: Yes, sir.

THE COURT: They don't tend to implicate Carchidi, because, well--

MR. DI BONA (interposing): Carchidi is not here today.

THE COURT: O.K. So, in any event, do you agree with their contention that these statements are not admissible unless there is a conspiracy involved?

MR. SPRAGUE: Your Honor, the statement would not be admissible unless there was a contention that Carchidi was also part of the crime, and that, therefore, any action or statement done by him in furtherance of the crime is admissible against Carchidi, Sullivan or anyone else connected with the crime.

Now, in my opinion, the statement is not only admissible against Sullivan, but you asked against Carchidi, as well. Certainly, it is against Carchidi, as well, and would be used against Carchidi at his trial.

[627]

I do not agree that the statement itself is not admissible for the purpose of helping to prove the conspiracy, because of the nature of the conspiracy. And, the nature of a conspiracy is an agreement between two or more people to do the criminal act. That can be proved by words or deeds. There is nothing which says that the agreement itself must be proven only by words or by deeds, and that words as well cannot help prove the criminal act of conspiracy.

Now, we intend to introduce what Carchidi said at a certain point, to show Carchidi's participation, as well, with Sullivan in this particular crime, and his statement is evidence of that.

MR. DI BONA: If Your Honor please, that is the most blunt--

THE COURT (interposing): I don't understand your objection. What is your objection?

MR. DI BONA: Sir--

THE COURT (interposing): Why can't he prove that?

MR. DI BONA: You and I are sitting in this room. You make a statement, right? You

[628]

make a statement: "DiBona and I are going to hold up a bank." Is that admissible against me, unless they show that I talked to you about the bank, or that I went out and cased the place?

THE COURT: Wait a minute; wait a minute. I don't understand. The objection, then, is because he is going to prove hearsay statements of Carchidi?

MR. DI BONA: Right, sir.

THE COURT: Through McGrath, or whatever his name is?

MR. DI BONA: Right, right.

THE COURT: And, he says, "Well, it is hearsay, but it is admissible because it tends to implicate McGrath and Sullivan as part of a conspiracy."

MR. SPRAGUE: Not McGrath; not McGrath.

MR. DI BONA: No. Carchidi and Sullivan.

THE COURT: Carchidi and Sullivan. What did I say?

MR. SPRAGUE: You said "McGrath and Sullivan."

MR. DI BONA: The point is this, sir: They have shown no agreement or meeting between

[629]

these people. They have shown nothing, and they will show nothing later. All you have got is a statement.

Now, for example, sir, to follow his argument to a logical conclusion, John Roosevelt makes a statement in California today that: "DiBona and I are going to hold up a bank in California."

Now, they have never shown us to be in the same State, in the same country; never having seen each other.

THE COURT: You don't object to the admissibility? You just think there has to be more preparation?

MR. DI BONA: No. It is admissible only if it is the statement of Sullivan. The statement's admissibility, sir, is based on the fact that Carchidi is acting for Sullivan. This is the "A" to "Z" relationship. In the civil law, for example, sir, you cannot prove the statement of the agent to establish the relationship--I mean, that is axiomatic--an agent cannot, by his own statement, establish the master-servant relationship. Am I right, sir? In the civil law you can't establish the master-servant relationship

[630]

by the statement of the servant.

THE COURT: Why not?

MR. DI BONA: It is clear in law, sir. You have got to show acts or other conduct to establish the relationship. Once you have established the relationship, then, the servant's statements may be admissible against the principal.

THE COURT: If you ask him: "Who were you working for on such and such a date," you mean I can't let him answer that question?

MR. DI BONA: You mean ask him by whom he was employed? That's right.

THE COURT: To show the relationship, to show the wage relationship, if it is not contradicted, it is uncontradicted evidence of agency.

MR. DI BONA: Sir, suppose you get the guy on the witness stand. You put the servant on the witness stand--or, forget the servant. In an automobile plaintiff, he gets on the witness stand and says, "When the accident happened, Al Barbieri, the driver of the other car, said to me he works for John Wanamakers." Is that admissible, sir?

THE COURT: Now I understand what you

[631]

mean, yes.

MR. DI BONA: All right. Now, what he is doing here in this case is saying Carchidi is going to say something through McGrath.

THE COURT: Unless it is part of the res gestae.

MR. DI BONA: Carchidi is going to make a statement now through McGrath. McGrath is going to testify to what Carchidi told him, and he is going to say to Your Honor, "Now, I want that statement admissible against Sullivan."

Now, I say you can only do that on the basis of an agency relationship between Carchidi and Sullivan; if Carchidi was authorized to make a statement by Sullivan, or made a statement in connection with a common plan, scheme, or conspiracy, fine.

Now, ask Mr. Sprague--and, I think we are entitled to it--is there any--certainly, there is nothing on this record at the moment of any conspiracy. There is no evidence--

MR. SPRAGUE (interposing): I am not--

MR. DI BONA (interposing): Wait a minute.

MR. SPRAGUE: I am not here to answer your questions, Mr. DiBona.

THE COURT: He is trying to set up his position here.

MR. DI BONA: Right. We will put it this way, sir: There has been no proof at the moment, any independent proof, of the existence of the corpus delicti of a conspiracy. I say to Your Honor there will be none. I am sure they have got no further evidence.

So, they are going to hang this thing on an ex-parte statement by hearsay method and ask the jury to infer from that not only the truth of that statement, but the statement being proof of a corpus of a crime, and I say, sir, it is just so completely outlandish. And, every case in the books is opposed to it. You have got to prove the conspiracy aliunde the statements.

Now, the order of proof, of course--

THE COURT (interposing): You may be right.

MR. DI BONA: No question about this.

THE COURT: It sounds reasonable.

MR. SPRAGUE: Well, it is not, Your Honor.

The point is that a conspiracy can be proven by words or by deeds. There is no--as a matter of fact, a conspiracy--

THE COURT (interposing): He says you are going to prove the whole conspiracy by hearsay evidence. You have nothing else to offer.

MR. SPRAGUE: Well, it just is wrong, Your Honor.

THE COURT: That is all we know.

MR. SPRAGUE: For example, in any conspiracy case, a statement by a person that: "I, along with 'X' planned to do so and so," the crime, is perfectly admissible for the defendant's own responsibility as a co-conspirator with the acts that "X" committed. You don't have to show anything beyond that.

He may argue the weight of that evidence, but we are talking about the admissibility of it, because a conspiracy, by the nature of the conspiracy, is the agreement by two or more people. In most instances, you never have any direct words saying, "Yes, 'X' and I agreed to do so and so."

You infer it many times from certain acts that were done.

[634]

Now, in this particular case, what the Commonwealth will--and, by the way, let me also interject when he says there is no corpus delicti as to the conspiracy, the only corpus delicti that the Commonwealth is required to present in this case is that of the crime of murder.

THE COURT: I don't think he meant it that way. I think--

MR. SPRAGUE (interposing): If you were having, for example, a felony murder on trial here, the Commonwealth would not have to, in addition to the corpus delicti of the murder, present independently a corpus delicti, let's say, of a robbery or a burglary. And, you don't have to do it any further than what we have done, in terms of the murder here.

Now, the evidence in this case that will be presented--and, the defense knows it--is to show Sullivan in the premises at 107. There are statements from Sullivan saying to this man: "Let your work go now," or, "Don't bother with it until Sunday."

We then have Sullivan coming into this

[635]

conference room, which Your Honor has seen on the chart, and Sullivan again saying to McGrath: "Let your work go until Sunday."

You then have DiPasquale--not DiPasquale; I mean Carchidi--coming into that same conference room.

THE COURT: While Sullivan is there?

MR. SPRAGUE: While Sullivan is there, and Carchidi now telling McGrath: "Let your work go until Sunday," the same request now by Carchidi.

THE COURT: The night of the 17th?

MR. SPRAGUE: Pardon?

THE COURT: The night of the 17th?

MR. SPRAGUE: Yes. This was on that Friday evening. This is moments, now, before the shooting, Sullivan and Carchidi both together, Carchidi now renewing, in effect, the same request that Sullivan already has been making of McGrath: "Let your work go until Sunday."

THE COURT: Without hearing Sullivan saying that?

MR. SPRAGUE: That's correct. Now, so, I propose to introduce the statement of Carchidi.

We then have evidence--

THE COURT (interposing): Which was made when to McGrath?

MR. SPRAGUE: Right at the time I am talking about, while Sullivan is there.

THE COURT: While Sullivan is there?

MR. SPRAGUE: Yes.

THE COURT: Well, that is different, though. Why isn't that admissible?

MR. DI BONA: My telling you not to work sir--is that evidence of a conspiracy?

THE COURT: No.

MR. DI BONA: Wait a minute, sir.

MR. SPRAGUE: May I finish?

MR. DI BONA: One moment, sir, please. The Judge asked me a question. If I were to say to you, sir: "Why don't you not work today? Work next week"--

THE COURT (interposing): I am not talking about that.

MR. DI BONA: Does that make me in a conspiracy with Sprague and everyone else, sir?

THE COURT: Maybe Mr. Sprague doesn't understand me. What are the other statements

that you want to offer? Were there other statements besides that?

MR. SPRAGUE: Yes. I was getting to that.

THE COURT: O.K.

MR. SPRAGUE: You have the statement which I have just referred to by Carchidi in the presence of Sullivan, the same request as already made by Sullivan, which is proper for this jury to hear on the question of conspiracy and concert of action between these two people. It is then followed by Sullivan leaving the room, and there will be testimony that just prior to this, Gorey had been in the room and had stepped out. You then have Sullivan leaving the room, and Carchidi having some further conversation. And, I don't recall at this point whether he repeated the request about let the work go until Sunday, but you then have what the witness describes as the explosion of firecrackers, what he thought.

This is within minutes after Sullivan has left the room. And, the witness then says to Carchidi: "What was that?"

And, Carchidi makes a response to the witness McGrath, saying: "Don't say nothing," which, again, is proper evidence and permissible for the jury to hear in showing the concert of action between Carchidi and Sullivan or others.

THE COURT: It is also part of the res gestae, too. It could come in on that basis. Couldn't it?

MR. SPRAGUE: Your Honor, it doesn't have to rest on that basis. These are perfectly proper statements by a person who was under indictment as a participant in the same murder. Now, following that--

THE COURT (interposing): Well, that has no evidentiary value, the fact that he is under indictment.

MR. SPRAGUE: No. I don't mean it in that sense. I am talking about the evidence.

THE COURT: All right.

MR. SPRAGUE: You then have it followed by this witness McGrath, who leaves the premises, and sees Carchidi's car down there, and Sullivan's car. And, when the witness comes back in about fifteen or twenty minutes, those two cars, plus

this black Cadillac to which reference was made, are all gone.

MR. DI BONA: Now, sir, assuming all this--

THE COURT (interposing): I don't see why that wouldn't be admissible evidence.

MR. DI BONA: Oh, if Your Honor please, if this represents a statement of the law that Mr. Sprague sincerely--

THE COURT (interposing): No. I don't care about the law.

MR. DI BONA: Wait a minute.

THE COURT: Let me ask you--let's forget the law for a moment. These things happened, I understand, within moments of the shooting.

MR. DI BONA: No, sir. That is another thing that is completely wrong. They haven't shown the shooting occurs at this time. As a matter of fact, the only evidence in this case is inconsistent with this, completely. They hear firecrackers. That's all they hear, sir. And, if Your Honor please, Your Honor heard me going on--

THE COURT (interposing): It is supposed

[640]

to be the gun going off, I guess.

MR. DI BONA: Your Honor heard me going on and on with Levy. People standing right outside of the building within ten feet heard only firecrackers. That's all they heard, sir. Nobody went up there to check, because they were convinced it was firecrackers. That is all it was. And, I honestly think that I believe that is all that occurred, sir. This killing occurred long after that--long after that--but, apart from that, sir, Carchidi makes a statement after Sullivan is gone. Where Sullivan went, they can't and they won't establish by their evidence. Sullivan left the conference room. As a matter of fact, he went back to his office, and the evidence will show that.

But, can he be responsible for what Carchidi said? How do we know, sir, that Carchidi was not in a conspiracy with John Smith, Tony Brown and George Raft? How do we know that, sir? Is the fact that Carchidi said: "How come you are cleaning today," right--

THE COURT (interposing): Well, yes. But, look. The probative value of it is always--

[641]

MR. DI BONA (interposing): But, sir--

THE COURT (interposing): We are talking admissibility.

MR. DI BONA: We are talking admissibility. No statement of an alleged co-conspirator is admissible, sir, until they show a conspiracy, the agreement, as he says. Now, where is the evidence of the agreement?

If they would show, sir, for example, that Carchidi and Sullivan had gone out and purchased guns, or that Wullivan and Carchidi had met before this and discussed something, or that Sullivan and Carchidi had an argument with Gorey, or that Wullivan and Carchidi had discussed their plans, or something of that sort, something to show an agreement between the two, then the statements are admissible.

But, here there is no agreement, no evidence of any. For all this record is concerned, sir, for everything in this record, Your Honor can't make a finding that Sullivan even knew Carchidi prior to that night. There is no evidence that Sullivan had ever seen Carchidi in his life prior to that night, sir, prior to his walking

into that conference room. There is not a scintilla of evidence in this case that Sullivan knew Carchidi at that moment, sir.

Now, how can his statement become admissible, the statement of Carchidi become admissible, against Sullivan? All he asked the man in the presence of Sullivan was: "How come you are cleaning tonight?"

Now, is this evidence?

THE COURT: Who said that?

MR. DI BONA: Carchidi. He says to McGrath: "How come you are cleaning tonight?" That's what McGrath says, or the credibility of that is another issue, but all he saus is: "How come you are cleaning tonight?"

Right? Now, how does that become evidence of a conspiracy or plan by Carchidi, Sullivan, or anyone else, to kill Gorey? Now, sir, it is as outlandish as all that.

MR. SPRAGUE: He is arguing, Your Honor, on the weight, and he is making a jury argument, not the admissibility of this evidence.

THE COURT: Well, we--

MR. DI BONA (interposing): Suppose, sir--

THE COURT (interposing): Off the record.

(There was an off-record discussion.)

MR. DI BONA: Judge, we are now at a crucial point, and this ruling is important both to the Commonwealth and the defense. I say to Your Honor with all the sincerity at my command, sir, it is just absolutely, positively, conclusively inadmissible, unless the District Attorney is willing to state: "Your Honor, I will follow that up by showing the further evidence of the existence of a plan." If he has got any other evidence, fine.

MR. SPRAGUE: I submit that this evidence of itself, Your Honor, is sufficient.

MR. DI BONA: In other words, sir, there is no other evidence in this case with respect to the existence of a conspiracy. I mean, you have got to make that assumption for the purpose of this argument. I say it just isn't even close.

THE COURT: Off the record.

(There was an off-record discussion.)

MR. PERUTO: Before the statement can be admissible, to begin with, for McGrath to testify as to what Carchidi said, you start off,

[644]

No. 1, on the basis of its being hearsay. Now, you state, sir, that it is taken out of the realm of hearsay if it is the statement of a defendant.

No. 1, Carchidi is not the defendant in this case. Now, can you get it then in on the basis of the statement of a co-conspirator? Well, any statement--and, after all, the statement is in the nature of an admission--any admission is not admissible until, first, you have proved the corpus delicti of any crime. Now, if you were to allow this in, it would give an inference to the jury. Now, we have to decide whether it is a proper inference or not a proper inference.

We have not shown a conspiracy between Carchidi and Sullivan. In the first place, sir, everything negates that, because the Commonwealth's testimony is that during the time that Carchidi is with McGrath, in McGrath's presence, this, according to the Commonwealth's theory, murder occurred. Now, that would be--

THE COURT (interposing): Off the record.

(There was an off-record discussion.)

(The proceedings were resumed in open

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[647]

FIFTH DAY

IN THE COURT OF OYER AND TERMINER, QUARTER SESSIONS OF THE PEACE, AND GENERAL JAIL DELIVERY, IN AND FOR THE COUNTY OF PHILADELPHIA

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COMMONWEALTH : NOVEMBER SESSIONS, 1966

vs. : NOS. 190 & 193

JOHN SULLIVAN :

- - - - -

TUESDAY, June 13, 1967

- - - - -

453, City Hall, Philadelphia, Pennsylvania

- - - - -

BEFORE: HONORABLE ALEXANDER J. BARBIERI

APPEARANCES:

RICHARD A. SPRAGUE, ESQ.,
Assistant District Attorney,
For the Commonwealth;

G. FRED DI BONA, ESQ.,
A. CHARLES PERUTO, ESQ.,
For the Defendant.

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[648]

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(In Chambers)

MR. DI BONA: First, I would like to call Your Honor's attention to the fact that about a half an hour ago the Jury was brought in and as they were walking up the corridor, the west side of the hallway of the Jury Room, the press was there and took motion pictures of the Jury as they came into the Jury Room.

We think it is prejudicial in the sense that it highlights the presence of the Jury out of proportion. I realize that nothing can be done except that Your Honor direct the Court's Officers not to let them do it.

MR. SPRAGUE: Are you making any motions other than that?

MR. DI BONA: Again, I am not going to make any motions.

MR. SPRAGUE: Are there any other motions?

MR. DI BONA: I will not make any motions for the withdrawal of any juror because there is nothing to gain from such a motion. It is obviously a plan of the Commonwealth to have the withdrawal of the juror.

THE COURT: I understand your position, Mr. Di Bona. The only thing I can do is to have the Court Officer try to avoid this because of the reasons you have given. There must have been some error in that; I don't know.

All right, you have made your comments and I ask

[649]

that the Court Officers try to prevent this from happening in the future.

MR. DI BONA: Your Honor, do you recall the testimony of Ellen Caputo ? Mr. Sprague stated to Your Honor, in view of the fact that the witness had testified that he had a copy of the oral statement that was made to the detective, and it was understood that the statement would have to be furnished to Defense counsel for cross-examination.

MR. SPRAGUE: I think you should also say I did that last night.

MR. DI BONA: Yes, yesterday afternoon when I called I didn't ask you for it, you gave it to me at that time. You dictated to me and I took it down in longhand. I have taken those notes. I would, therefore, ask that Ellen Caputo be brought back to the witness stand so that I may complete my cross-examination.

MR. SPRAGUE: I have no objections to that, but I will ask the Court Officer to check to see if she is here. As I understand your Honor's admonition to her, when she left last night, she was not to speak to anyone, and if I may say so, as far as the Commonwealth is concerned, no one stepped near her. I don't know where she is.

While on this subject, I do take exception to the

[650]

Court singling out that one witness to admonish her in the presence of the Jury, with regard to not discussing this case with anyone or having anyone speak to her. The Court also has shown solicitude from the Defendant's standpoint of view not to have said anything, in the presence of the Jury or at one time in the open court room, about the fact that certain people took the Fifth Amendment. I think the Court making this statement in the open court room that it did in front of the Jury about, "Don't speak to anyone or let anyone speak to you," that it did improperly give or could give rise to the Jury thinking that the Court feels that something is wrong with this witness. Again, I have no motion to make on this, but I just wanted to bring that to the Court's attention.

THE COURT: I just don't see how the Jury could have interpreted this the way you inferred that they might. This is the first witness in front of the Jury and the question of further testimony was discussed. Maybe it should not have been, but it was. I think that it was only natural to tell her that, and I don't think it is comparable to somebody pleading the Fifth Amendment.

Do you have something to say?

MR. DI BONA: Yes, Your Honor. Do you have a motion with respect to that?

[651]

MR. SPRAGUE: No, I'll play the game that you played when I asked you did you have a motion.

MR. DI BONA: I would like to add to that briefly. There is a world of distinction as to your points, and indeed, while Mr. Sprague was arguing so eloquently that the Fifth Amendment should be pleaded to before the Jury --

THE COURT: He didn't take that position.

MR. DI BONA: He did, sir, and it was brought out that when the shoe was on the other foot it made a difference. He argued most eloquently that the Commonwealth should not be forced to plead the Fifth Amendment before the Jury.

THE COURT: Do you want to make any comments on that?

MR. SPRAGUE: Which case was that?

MR. DI BONA: The North case. In that case you requested, as I understand it, and stated, that it was unfair to have a plea of the Fifth Amendment before the Jury, which the Defense wanted in their case.

Now, I contend there must be a distinction and I think you ought to bring that out to be discussed. I have a feeling that we would all feel better if we didn't, in front of the Jury.

MR. SPRAGUE: I do have a comment to make.

[652]

THE COURT: Do you have another point?

MR. DI BONA: Yes, Your Honor. With respect to McGrath, before Your Honor makes a ruling I would like to call to Your Honor's attention first, the statement of facts.

Your Honor, great weight was attached yesterday, and I listened, that Sullivan and Carchidi, both made statements to McGrath in the presence of each other. Number one, in the office where Sullivan asked,"how come you're cleaning up tonight", was not made in the presence of Carchidi and the second time he asked, "how come you're cleaning up tonight," was not made in the presence of Carchidi. Carchidi's statement, number one, "Why are you cleaning up tonight" and "get out of here, you heard nothing," both were made to McGrath in the absence of Sullivan.

There is no indication in this case now and in McGrath's testimony before the Medical Examiner of any such statement.

I call to your attention something which I think is a succinct statement of law and can give clarification with respect to this matter. Commonwealth v Rosen, 141 Superior Court 272 at 276; in discussing the very issue before Your Honor as admissible to alleged statements of alleged co-conspirators, and in that case I

[653]

would like to add that the conspirators all were tried on charges. "Certainly, a foundation must first be laid by proof sufficient to establish the unlawful agreement, before the acts or declarations of one defendant during the existence of the conspiracy, may be received as evidence against all the others."

In other words, the Court said that you must first have the existence of conspiracy. We don't suggest, Your Honor, that means that the Commonwealth must have a man come in to testify that A, B, and C were standing on a street corner and said, let's agree to become confederates with each other to commit a crime. Here you are proving the conspiracy by showing a meeting of people and a procurement of weapons. The Commonwealth's designed purpose is making evidence of that kind prima facie for establishment of an agreement; once you have done this, once you offer that into evidence and place in evidence the statement or acts of these conspirators, you go on to further conspiracy. In this case, as Mr. Sprague stated on the report, there isn't the slightest scintilla of evidence that there is a conspiracy. I further state that there is no evidence of conspiracy except the so-called declarations, the comments of Sullivan and Carchidi to McGrath. I submit that under those circumstances there

[654]

is not the slightest scintilla of evidence for admissibility.

Then, sir, I would like to add to that, that the requirements set forth in the Rosen case is to establish the admissibility where co-conspirators state them. It is obvious that you can't introduce into evidence a statement made by the other person, third person until (one) the existence of conspiracy is shown; and (two) the person conceived was not one of the conspirators. There is no evidence in this case that Carchidi was a conspirator. That is my argument.

MR. SPRAGUE: Are you finished, Mr. Di Bona?

MR. DI BONA: Yes.

MR. SPRAGUE: Your Honor, I am not sure that since we have recessed from yesterday until today, this Court has studied the law that is applicable in this area. I don't see much point to arguing the law except to state that certainly concerted action is made admissible, the statements of any of the co-conspirators. What I suggest to this Court at this point are the facts of this case and under the facts, I submit the following, and I include what is already in evidence is included in my offer of proof.

[655]

You have already in evidence that two people were killed by ten different bullets shot into two individuals, coming from two guns. Whatever the space of time was from that, it is permissible to infer concert of action by two or more people. Certainly the law is that once there is evidence of concert of action by two or more, then the statements by any and all people would be admissible in terms of being co-conspirators.

Beyond that incident in itself, there is also the following, which I repeat, is in my offer of proof:

McGrath's testimony will relate his coming to this building and seeing Sullivan looking out from an office window that was not his office. Among other things, McGrath will relate conversations that he had with Sullivan, wherein, among other things, Sullivan suggested that he let the cleaning go until Sunday. This conversation occurred on Friday after 6:00 P.M.

THE COURT: Did he give any reason for that?

MR. SPRAGUE: Pardon me, Your Honor?

THE COURT: Did Sullivan give any reason for saying, let it go until Sunday?

MR. SPRAGUE: Yes, Your Honor, he did say in words to the effect that there was going to be a meeting in there and they were going to mess things up and so

[65b]

forth, but he did say, let it go until Sunday. Following that, you have, and will have, testimony by McGrath that, he, McGrath, after he had gone about cleaning up and he had been in the conference room and had a brief conversation with the deceased, John Gorey; that within seconds of John Gorey leaving that room --

THE COURT: In what room did he have the conversation?

MR. SPRAGUE: In the conference room, which I think Your Honor knows from the setting up of the map is fairly close to the location of the office that Sullivan had been in and the office that had been labelled Gorey's office. Within 20 to 30 seconds after Gorey leaves the conference room, McGrath testified that Sullivan came into that conference room and again said words suggesting that he let the cleaning go until Sunday. I at no time said that either of those two conversations by Sullivan was said in the presence of Carchidi, and when Mr. Di Bona now makes much of the fact that his reviews show that it was not made in the presence of Carchidi, he is building his sandman up to rip him down because I haven't said that. Following the second conversation with Sullivan, Sullivan repeats words to the effect about letting the

[65?]

cleaning go until Sunday, McGrath will testify that he was still in the conference room with Sullivan when Carchidi came into that room, and I may say as well, Your Honor, that part of McGrath's testimony will be that when he arrived at this building and saw Sullivan looking out the window --

THE COURT: Which window?

MR. SPRAGUE: The window from Amoroso's office. The testimony will be that is the only office that looks out over the parking lot; McGrath saw two cars on the parking lot, one is the car that he identifies as a car belonging to Sullivan and another is a black Cadillac, which he identifies because of its banged-in right side, and is a car that belongs to one John Rispo. Subsequent evidence will show that the car had been loaned by Rispo to a man by the name of Di Pasquale. McGrath will relate also that he went into the office building and he first saw Sullivan from inside the office; that Sullivan was observing the two deceased, John Gorey and Rita Janda, and that Sullivan made a comment about Rita Janda not being a bad-looking broad. There will also be testimony that this office was not Sullivan's office. Getting back to the conference room, McGrath will testify that when Carchidi came into the

evidence of conspiracy. I take issue with that because there must be two issues; if you have overcome the requirement of some evidence of conspiracy, you then have the second, evidence as to whether Carchidi was one of the co-conspirators and the last point, the Jury can be instructed to disregard it.

THE COURT: I understand what you are looking at, but the law of Pennsylvania is not with you. The law of Pennsylvania says, to establish the concert of action after the declaration is entered into, provided that there is some slight indication that it was admitted. We have more than that here with the offer of proof. To be perfectly frank, I spent a lot of time, and I have already put that on the record, and I am convinced of all the evils of the ruling, the one that recommends itself to me at the moment, is to allow this evidence. I think it cannot be harmful.

MR. PERUTO: I think the Court is looking upon it as an error, but with concert of action I know that no one in this room could ever define concert of action between Carchidi and Sullivan, so to put Sullivan in that light is slight error.

(Whereupon, at this time, there was an off the record discussion.)

(Whereupon, at this time, a luncheon recess was held)

room there was a conversation between Carchidi and McGrath and Sullivan then left the room. Now, I said yesterday that when Carchidi came in he related to McGrath, "Why don't you let the cleaning go until after the Sunday meeting." I was under the impression that the conversation was when Sullivan was in the room and I said I do not know whether it re-occurred when Sullivan left this room. Counsel said it was the reverse; that no conversation took place when Sullivan was there, but when McGrath was there.

MR. DI BONA: That's what he said.

MR. SPRAGUE: In any event, within a short period of time after Carchidi comes in and there is no conversation between Carchidi and Sullivan, although again, subsequent evidence will show that Carchidi and Sullivan knew each other for two to two and a half years of working at the same place.

THE COURT: When was this that there was no conversation?

MR. SPRAGUE: When Sullivan was in the conference room talking with McGrath, having related to McGrath again, "why don't you let the cleaning go until Sunday." Carchidi came in there and immediately spoke with McGrath and there was no greeting between Carchidi and Sullivan, although in fact they do know each other and have been associates anywhere from two to two and a half

[660]

years. I submit to the Court that the lack of greeting is a significant factor there as well. After Sullivan left the room, and this is within, I think, a matter of five minutes after he had entered and after Gorey had left this room, Carchidi continued on with some conversation with McGrath. During this conversation, as the Defense said, it was repeated or said, "why don't you let the cleaning go until Sunday." McGrath will relate that he heard loud noises which he thought were firecrackers. He will also relate that at that time, Carchidi was behind him and he turned to Carchidi and said, "what was that?"

Whereupon, Carchidi related words to the effect, "get out of here and don't say nothing."

Now, at this point McGrath left the building and upon leaving the building, I think I should point out to the Court that McGrath would testify that the doors of the second floor into the various offices were opened for going into them for the purpose of cleaning them up and whatnot, and when he, McGrath, left the premises and went downstairs he observed on the parking lot the car which he identifies as Sullivan's and that same black Cadillac with the banged-in right side and as well, he observed a car which he identifies as Carchidi's car.

[661]

He, McGrath, leaves. He will relate that he came back; frankly he came back because he thought that having rushed out of the place and leaving his bucket and mop and cleaning material upstairs, that he was being set up as a patsy by one of theDefendants. That is the reason why he was rushing out. In any event, he came back in a short time and what he observed was that the cars belonging to Carchidi and Sullivan and the black Cadillac, with the banged-in right side, were missing, and no longer at the scene.

I also refer the Court to the fact that it is already in evidence that when Sullivan was questioned by the police, he stated that he was not in the building at the time of the shooting.

THE COURT: That carries with it the inference as to when the shooting took place.

MR. SPRAGUE: That carries a number of things, Your Honor. That is one part of it. The second part is that when McGrath heard the firecrackers, that is when the shooting took place with the fact that Sullivan's car, still down there when he, McGrath, left, and that is certainly sufficient to put a lie to what Sullivan said, that he was not at the place at the time of the shooting. In any event, that argument is for the Jury.

[662]

I submit in evidence the presence of Carchidi, the conversation Carchidi had with McGrath, are admissible in this case. There is a slight addition of evidence necessary in the sense of him being there; there is the lack of greeting between himself and Sullivan, the awareness that each knew the other would be there, neither being surprised at seeing the other there. The factor that the crime itself gives rise to inferences of having been committed by two people; the fact that the cars were there and gone by the time McGrath came back, also is sufficient to allow this testimony. I would also say there is a case which we have for the Court, which Mr. Wolf will hand out. In a sense, it is part of what occurred and is well worth looking into as to what would be a verbal act. The words of Carchidi, "get out of here and don't say anything" are really no different than the act which could be of holding someone, or in fact pushing him out as well.

Off the record.

(Whereupon, a discussion was held off the record.)

MR. SPRAGUE: For the record, Your Honor, that summarizes the sum of my statement.

MR. DI BONA: Your Honor, I have never heard such ridiculous and obscure arguments. What Mr. Sprague is

[663]

saying is that a statement is admissible against Carchidi and therefore becomes admissible against Sullivan because Sullivan said, "how are you doing." The issue is not the admissibility of the statement; the issue is against Sullivan.

My friend here speaks of concert of action, the fact that two guns were used shows concert of action. Let's assume that to be a fact.

THE COURT: I don't want to assume that is what it meant.

MR. DI BONA: Two guns were used and ten shots were fired, which indicates that one or more people were acting in concert; that well may be. How do you get Sullivan in that concert of action when Carchidi makes no statement in the presenceof Sullivan and Sullivan makes no statements in the presence of Carchidi? How on God's earth can you say what Carchidi said can be used to convict Sullivan of murder? If I was sitting in that Union hall and heard firecrackers, I think my reaction would be, let's get the hell out of here. There is no indication that I committed murder or thought that it was committed. There isn't a single scintilla of evidence to this case that any killing occurred at Local 107 at 7:15 or 7:30 that night; there is not the slightest scintilla of evidence.

As a matter of fact, the evidence, if anything, is quite the contrary. The evidence is that the killing occurred on June 18th, on the Saturday morning. The date of death is in Dr. Fillinger's report, and it says June 18th. Secondly, no one can say that the bullets were fired at 7:15 or 7:30. I brought out yesterday, as Your Honor recalls, from Mr. Levy that three people on the sidewalk under the window of Gorey's office heard what they thought were fire-cracker noises, which is not consistent with bullets, and they didn't pay any attention to it. McGrath didn't pay any attention to it. He testified that he thought the noises were firecrackers. He went back to the building and never checked with Gorey or with anyone else. I cited to Your Honor the cases and there is no dispute that the Zuern and theJermyn case all require proof sufficient to stand the unlawful agreement as of declaration. One defendant may be the receiver as evidence against the other. I submit there is just no basis of law or fact for Your Honor to admit that statement in evidence.

MR. SPRAGUE: Are you finished, Mr. Di Bona?

MR. DI BONA: Whatever Sullivan did and said, everything alleged to have been said was completely with innocence and not guilt. There is nothing in this

case that says that any bad motive on the part of Sullivan existed.

MR. SPRAGUE: I would like to have a brief word, please.

MR. DI BONA: And then, of course, there is no evidence that Carchidi was a conspirator, and if so, there is no evidence shown that he was a conspirator with Sullivan.

THE COURT: Do you have something to say?

MR. SPRAGUE: I think the fact that counsel feels the need to label arguments ridiculous and obscure, points to a great deal of frailty. I think it adds to the weakness of his position; part of his argument is that everything that Sullivan did is consistent with innocence;when he argues about the time of the killings that there is no proof that they happened at 7:15 or 7:30, and when he argues as to what Mr. Levy said.

The issue before the Court is the slightest evidence showing a concert of action and I submit that the summary that I gave to the Court, the Court should find it satisfactory that there is slight evidence. I will cite the following cases: Commonwealth v Lowry, 374 Pa. 594 at Page 600, 1953; Commonwealth v

[666]

Thomas, 337 Pa., Page 72; and Commonwealth v Stranz, 328 Pa. at Page 33. The Commonwealth v Cohen, 203 Pa. Superior Court 34, 1964, at Page 45, the Court cited, Chief Justice Gibbons: " Now, the least degree of concert or collusion between parties to an illegal transaction makes the act of one the act of all."

THE COURT: I don't think you need to multiply this any further, Mr. Sprague. We are in my own chambers and I have researched this matter very strenuously.

MR. PERUTO: All of these cases cited are concert of action, that phrase being repeated over and over between two parties is actually the crux of the case. After listening to what Mr. Sprague had to say, I will try to put this in. Number one, as to the automobile alleged to have been borrowed by Di Pasquale from one John Rispo, there is no act indicated that Di Pasquale in any way is connected with the crime. There is no allegation that Rispo was connected with the crime. Beyond that, it shows that Sullivan was looking out of a window that was not his. That in and of itself does not mean anything ; to say that it was not his office does not mean that he did not have authority to use it.

[667]

THE COURT: You are telling me what the intent might show, and I am only interested in the admissibility as to hearsay.

MR. PERUTO: I am getting to that, Your Honor. All of the names and activities that Mr. Sprague has spoken to you about, you will note, that he never mentioned the acts of Carchidi. It was Sullivan who looked out of the window, never Carchidi. In other words, when you have concert of action between two parties, it is those two parties that we speak of. There is no concert of action in any way that involved Carchidi; therefore, you can't have it fit under the concert of action ruling.

THE COURT: I understand that, but I think the District Attorney is trying to demonstrate the factual side for his position. The authority on this issue, the only issue we are considering today. What we are trying to do is to find whether a certain hearsay statement is admissible. Hearsay may be something stated by Sullivan to McGrath, which is admissible, of course. Notice that something stated by Carchidi to Sullivan is questionable. The basis on which the statement could get in here, the one basis, is an exclamation by the firing of the firecrackers or guns or whatever he heard,

[668]

which I think would be admissible because it's a spontaneous exclamation in connection with the firing of a firecracker or a gun, and would have res gestae characteristics and would perhaps get in on that basis. The other remaining thing is a statement by Carchidi out of the presence of Sullivan, not in his presence, which is a hearsay statement and which the Commonwealth admits may only be admitted on the basis that Carchidi and Sullivan are co-conspirators. The law is very clear, as was established yesterday, concerning hearsay solely on the basis of the alleged conspiracy. There is no question about that.

However, there are some cases that do make it clearer as to the hearsay statement on the basis of the conspirator, that there must be some evidence of the conspiracy. As a matter of fact, some cases even say there must be proof of the conspiracy and the State of Pennsylvania is in line with that proof, which doesn't require absolute proof for admission of such a statement, but merely requires some prima facie evidence.

Now, that doesn't mean that the Commonwealth has to prove a prima facie case of conspiracy in order to have the hearsay statement admitted. The Commonwealth

[669]

must have some evidence of conspiracy. In Zuern and Jermyn, cited by both sides, it says that there need be only slight, the word slight is used. What constitutes a slight evidence of conspiracy is the only question I have before me, really, because the law is very clear. It may be that if the slight evidence turns out to be not sufficient to support an adequate showing of conspiracy and would invalidate the admission of the hearsay statement, the Jury will have to be instructed at a later time in the trial to ignore or disregard it.

I think the additional evidence must be added after the statement in accordance with the rule in the Horvath case, 183 Superior Court, 286. This is the Pennsylvania rule. Basically you get down to what constitutes, for our present purposes, a slight showing of conspiracy. I am aware that we have an offer of proof, which states many items of proof, perhaps none of which within itself constitute a slight showing of conspiracy. I am very concerned about this problem and I want everybody to note this. This may be a crucial element in the case for both sides. It is a first degree murder charge and it looks like first degree killings, terribly important to the Defense. On the other hand, this is the party and it

[67]

is enough to go to the Jury as to his guilt and he is the proper defendant here on evidence that will ultimately go the Jury, and the testimony adduced, and the Jury will so find then the seriousness to the present circumstances on a technical basis.

Taking all of these various little pieces that the District Attorney contains in his offer of proof, would I say that I see another circumstance and technical factor to the circumstances, and perhaps to rule a little impartial to either side.

It seems to me the factors in my mind are the persons concerning the facts. At this time, it would be perhaps more of a question, such as, the presence of Sullivan and Carchidi at a time which are not the normal working hours. The testimony will show that the working hours were not at night and the office was apparently closed. From what we have heard, Sullivan and Carchidi are in the conference room and their presence there is not explained. This doesn't mean that there is positive evidence of anything, but it is inferentially an indication of something unusual, or could give rise to the inference of concerted activity on the part of these two people in a spot very close to that where the killings took place. I am not

[671]

pretending at this point to pass on the sufficiency. This offer of proof to establish conspiracy in this case is in its final stage, but for this purpose it seems to me that in exercising whatever discretion I have, I would not wish to exclude the testimony. I find no evidence that requires me to do so, and the evidence that I do see makes it impossible for me to conclude that it shouldn't be admitted at this time.

I will grant you an exception.

MR. PERUTO: Exception. May I add a few remarks?

THE COURT: Yes, you may.

MR. PERUTO: First, this being a rule of the law, I think every citizen in the country should get a hut in Siberia and stay out of reach of humanity. It seems that all t e rules of law developed over the years are being thrown to us at this time. Your Honor, as to working hours, the exact working hours of McGrath, were the same working hours of Carchidi, since they both had the same job.

THE COURT: There is no evidence as to what Carchidi does.

MR. PERUTO: He is a janitor.

THE COURT: There is no proof.

MR. PERUTO: Your Honor, the fact that he was there after working hours, there is no evidence to

support that statement.

THE COURT: Why are two janitors in one room?

MR. PERUTO: Perhaps that's where they were working.

THE COURT: Is that the explanation?

MR. PERUTO: You put me in this position; a statement by Carchidi offered into evidence and can only be refuted by Carchidi.

THE COURT: That is the law because a defendant refuses to testify he can't offer something.

MR. PERUTO: The defendant can testify, but how can he testify to what Carchidi said, and you can't put Carchidi on the record.

THE COURT: In that such care in submitting a statement like this, it may be that we determine sometime not to use it, if so, no harm is done, and the Jury will ignore it. If it turns out that the ruling was erroneous, the Defendant can't suffer by this. But to terminate this, let's say to terminate at the presentation of the Commonwealth's case at this time, when we know that it is correct in permitting this evidence and when we may be erroneous not to think so.

MR. PERUTO: Your statement in the ruling is that the sole issue is whether or not there is slight

go to page 652, which stood before

AFTER LUNCHEON RECESS

THE COURT: I think the record should show that two of the jurors have had medical treatment and they are both here. I hope they are all right.

Mr. Wallace Holliman, how are you feeling?

MR. HOLLIMAN: I am all right, Your Honor. I had a touch of laryngitis.

THE COURT: Are you coming along all right?

MR. HOLLIMAN: I am feeling very good outside of slight hoarseness.

THE COURT: Mr. Jim Gunther, how are you feeling?

MR. GUNTHER: Very well, sir.

THE COURT: Let the record show that I have two certificates by physicians here, if you want these noted in the record.

MR. SPRAGUE: That's fine, sir.

THE COURT: Are you calling your next witness?

MR. SPRAGUE: Yes, Your Honor. Francis McGrath.

THE COURT: We will have a roll call first.

(Whereupon, at this time there was a roll call of the Jury and each juror was present and accounted for.)

MR. SPRAGUE: At this time the Commonwealth calls Francis McGrath.

THE COURT: Very well.

[674]

MR. DI BONA: Your Honor, I had planned to continue the cross-examination of Ellen Caputo, but I understand she is not here.

THE COURT: Every effort must be made to get her here as soon as possible. You will be given the privilege to continue your cross-examination.

MR. DI BONA: Thank you.

COMMONWEALTH'S EVIDENCE (continued)

****

EXCERPT FROM TRANSCRIPT OF TRIAL IN COMMONWEALTH V. JOHN SULLIVAN (June 16, 1967)

EIGHTH DAY

IN THE COURT OF OYER AND TERMINER, QUARTER SESSIONS OF THE PEACE, AND GENERAL JAIL DELIVERY, IN AND FOR THE COUNTY OF PHILADELPHIA

- - - - -

COMMONWEALTH : [illegible]

vs. : NOS. 120 & 137

JOHN SULLIVAN :

- - - - -

Friday, June 16, 1967

- - - - -

[illegible]

- - - - -

BEFORE: HON. [illegible] J. BARSIMI

APPEARANCES:

RICHARD A. SPRAGUE, ESQ.,
ASSISTANT DISTRICT ATTORNEY,
For the Commonwealth;

G. FRED DI BONA, ESQ.,
A. CHARLES PERUTO, ESQ.,
For the Defendant.

WE REGRET THAT THE ORIGINAL OF THIS PAGE WAS OF VERY POOR PHOTOGRAPHIC QUALITY.

****

THE COURT: Let the record show that I have reviewed the matter and I have all the copies that I ordered to refresh myself as to all the facts in the case so as to be fully aware of all the inferences and the facts. My judgment therefore, is that there is sufficient evidence to show a prima facie case and to

have the case go to the jury. The [illegible] is overruled.

MR. PERUTO: Mr. Di Bona has entrusted the defense to me and the defense rests.

MR. DI BONA: Now, I move for admission of the exhibits offered by the defense. Defendant's Exhibit 1, the photograph of the union hall on North Front Street.

****

MARILYN J. GELB, ESQUIRE
Attorney I.D. #12471
15th Floor
1314 Chestnut Street
Philadelphia, Pennsylvania 19107
(215) KI6-3232

IN THE

SUPREME COURT OF THE UNITED STATES

TERM 197__

NO. 78-1832

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SUPREME COURT, U.S.

JULIUS T. CUYLER, Superintendent

and

DISTRICT ATTORNEY OF PHILADELPHIA, Petitioner

V.

JOHN SULLIVAN, Respondent

MOTION FOR LEAVE TO PROCEED IN FORMA PAUPERIS

TO THE HONORABLE, THE JUDGES OF THE SAID COURT:

The motion of John Sullivan, respondent, by his attorney Marilyn J. Gelb, Esquire, respectfully represents:

1. That he is the respondent in the above-captioned case.

2. That petitioners in the above-captioned case have filed a Petition for Writ of Certiorari to the United States Court of Appeals for the Third Circuit, which Court reversed the order of the United States District Court for the Eastern District of Pennsylvania, and issued a Writ of Habeas Corpus discharging respondent from state custody by order of February 14, 1979.

/.

3. That respondent was granted leave to proceed in forma pauperis by order of Davis, J., of the United States District Court for the Eastern District of Pennsylvania on July 25, 1977.

4. That respondent was released from state custody on May 24, 1979, having been continuously in custody since his arrest on homicide charges on November 3, 1966.

5. That respondent is the owner as tenant by entireties of premises 751 Michell Street, Ridley Park, Pennsylvania, which realty is the home his wife and minor child presently occupy and which he is reliably informed is encumbered by a first mortgage held by the Industrial Valley Bank with a principal sum in excess of $10,000.00.

6. That he has no bank accounts and no other assets; that he has no income other than social security disability benefits due to his ill health; that he is unable to work and has no money to proceed with the Answer to the Petition for Writ of Certiorari.

WHEREFORE, respondent prays the Court to permit him to file the Answer to the Petition for Writ of Certiorari without paying fees or costs.

Respectfully submitted,

Marilyn J. Gelb, Esquire
Attorney for the Respondent.

2.

Forma Pauperis Affidavit

COMMONWEALTH OF PENNSYLVANIA:
SS
COUNTY OF PHILADELPHIA :

JOHN SULLIVAN, being first sworn under oath, presents that he has subscribed to the above and does state that the information therein is true and correct to the best of his knowledge and belief.

John Sullivan

Sworn to and Subscribed
Before Me This 27th Day
of July, 1979.

Margaret H. Burns
Notary Public

My Commission Expires:

MARGARET H. BURNS
Notary Public, Phila., Phila. Co.
My Commission Expires March 3, 1983

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IN THE

SUPREME COURT OF THE UNITED STATES

TERM 197__

NO. 78-1832

JULIUS T. CUYLER, Superintendent

and

DISTRICT ATTORNEY OF PHILADELPHIA,
Petitioner

V.

JOHN SULLIVAN, Respondent

RESPONDENT'S ANSWER TO PETITIONERS'
PETITION FOR WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

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INDEX

	Page
Table of Citations	II;III
Opinions Below	1
Jurisdiction	1
Questions Presented	2
Constitutional Provisions Involved	3
Statutory Provisions Involved	3
Statement of the Case	3-10
Reasons for Denying the Petition	11-30
Conclusion	30

TABLE OF CITATIONS

Federal Cases

Austin v. Erickson,
477 F.2d 620 (8th Cir. 1973) 14;19

Foxworth v. Wainwright,
516 F.2d 1072 (5th Cir. 1975) 18;19

Haggard v. State of Alabama,
550 F.2d 1019 (5th Cir. 1977) 18

Holloway v. Arkansas,
435 U.S. 475 (1978) 17

Johnson v. Zerbst,
304 U.S. 458 (1938) 14

Kaplan v. Bombard,
573 F.2d 708 (2nd Cir. 1978) 13

Lollar v. United States,
376 F.2d 243 (D.C.Cir. 1967) 14

McHenry v. United States,
420 F.2d 927 (10th Cir. 1970) 18

Ramsey v. United Mine Workers of America,
401 U.S. 302 (1971) 22

Thatcher v. Bordenkircher,
590 F.2d 640 (6th Cir. 1979) 18

Townsend v. Sain,
372 U.S. 293 (1963) 29

United States v. Atkinson,
565 F.2d 1283 (4th Cir. 1977), cert. denied
98 S.Ct. 2845 (1978) 13

United States v. Carrigan,
543 F.2d 1053 (2nd Cir. 1976) 13;17

United States v. Foster,
469 F.2d 1 (1st Cir. 1972) 13;17

United States ex. rel Hart v. Davenport,
478 F.2d 203 (3rd Cir. 1973) 23

United States v. Mondell,
525 F.2d 671 (7th Cir. 1975) 13

Unites States v. Ortiz,
422 U.S. 891 (1975) 22

United States ex. rel Sullivan v. Cuyler,
593 F.2d 512 (3rd Cir. 1979) 29

Walker v. United States,
422 F.2d 374 (3rd Cir. 1969) cert. denied
399 U.S. 915 (1970) 16

Watkins v. Wilson,
408 F.2d 351 (9th Cir. 1969) 18

Pennsylvania Cases

Commonwealth v. Sullivan,
446 Pa. 419, 286 A.2d 898 (1971) 5;25

Commonwealth v. Sullivan,
472 Pa. 129, 371 A.2d 468 (1977) 5;6;

Commonwealth v. Werner,
217 Pa. Super. 49, 268 A.2d 195 (1970) 30

Commonwealth ex.rel Whitling v. Russell,
406 Pa. 45, 170 A.2d 641 (1962) 30

IN THE

SUPREME COURT OF THE UNITED STATES

TERM 197__

NO. 78-1832

JULIUS T. CUYLER, Superintendent

and

DISTRICT ATTORNEY OF PHILADELPHIA,
Petitioner

V.

JOHN SULLIVAN, Respondent

RESPONDENT'S ANSWER TO PETITIONERS' PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

The respondent, John Sullivan, respectfully prays that a Writ of Certiorari not issue to review the judgment and opinion of the United States Court of Appeals for the Third Circuit entered in the above-entitled case on February 14, 1979.

OPINIONS BELOW

The Opinions below are reproduced in the Petition.

JURISDICTION

The jurisdictional requisites are adequately set forth in the Petitions.

QUESTIONS PRESENTED

1. Should certiorari be granted if the Circuits adhere to a differing standard of review of Sixth Amendment claims in a case where the underlying facts supporting a Sixth Amendment violation compel the same result reached by the Court below under any standard of review?

2. Should the petition be granted as to an alleged absence of state action, where such allegation is raised for the first time in the petition, and where in any event the record demonstrates state action for Fourteenth Amendment purposes?

3. Should the petition be granted on the basis of an allegation of abuse by the Third Circuit of state fact finding process, where the Third Circuit decided no facts but reached conclusions of law based upon facts developed in the record?

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The constitutional and statutory provisions involved are set forth in the Petitions.

STATEMENT OF THE CASE

PROCEDURAL HISTORY

On the evening of June 17, 1966, John Gorey, a minor labor union official, and Rita Janda, his companion, were shot to death in Gorey's office at the Philadelphia headquarters of Teamsters Local 107. Respondent, John Sullivan, was arrested and indicted for the murders, as were two others, Gregory Carchidi and Anthony DiPasquale.

Two attorneys, G. Fred DiBona and A. Charles Peruto, entered appearances on behalf of each of the three defendants. Respondent, in June, 1967, came to trial first. The defense rested without putting on any evidence. The jury convicted the respondent and sentenced him to life imprisonment. Carchidi was later acquitted of the same charges in a separate trial on January 26, 1978, as was DiPasquale on March 14, 1968.

Respondent's post trial motions in July 1968 were denied by a three judge panel of the Court of Common Pleas, with one judge voting to grant a new trial. After sentence of two consecutive life sentences was imposed, respondent filed a direct appeal to the Pennsylvania Supreme Court. He also filed an application in the trial court for a writ of error coram nobis, which was denied. Asserting Sixth Amendment claims including ineffective assistance of counsel in failing to brief his appeals, respondent petitioned pro se for habeas corpus relief in federal court. The petitions were dismissed on September 17 and December 31, 1969, and on November 26, 1969 the docket of the Pennsylvania Supreme Court reflected the claim that no briefs were ever filed on his behalf in the Pennsylvania Supreme Court. The essence of respondent's collateral attack of his conviction in federal court was later raised in state court post conviction proceedings.

On December 29, 1971, an equally divided Pennsylvania Supreme Court affirmed Sullivan's convictions, with three justices voting to discharge Sullivan because the evidence was insufficient to support the verdicts. Commonwealth v. Sullivan, 446 Pa. 419, 286 A.2d 898 (1971). Respondent, through new counsel who continues to represent him, has twice been denied reconsideration of the Supreme Court decision. Commonwealth v. Sullivan, 472 Pa. 129, 180, 371 A.2d 468, 492 (1977).

Respondent then collaterally attacked his conviction in the Pennsylvania courts. On October 30, 1973, a petition for post conviction relief under the Pennsylvania Post-Conviction Hearing Act (PCHA), 19 P.S. §1180.1 et.seq., was filed. This resulted in five days of evidentiary hearings. Sullivan, Carchidi, Peruto, DiBona, the trial judge and others testified. On November 6, 1974, the PCHA court ruled that respondent had been denied effective assistance of counsel on appeal and permitted him to file a second direct appeal to the Pennsylvania Supreme Court.

Sullivan filed his second appeal nunc pro tunc and also appealed from the denial of post conviction relief on other grounds. The Commonwealth cross-appealed the decision to permit a second direct appeal to be filed. All three appeals were consolidated and argued on January 16, 1975. On February 28, 1977, the Supreme Court affirmed the original conviction and the denial of post-conviction relief. Commonwealth v. Sullivan, 472 Pa. 129, 371 A.2d 468 (1977), with a factual finding of ineffective assistance of counsel on appeal.

Respondent then filed for habeas corpus in the United States District Court for the Eastern District of Pennsylvania. The petition was referred for report and recommendation to a United States Magistrate, who found that Sixth Amendment grounds for relief existed and recommended that the writ issue.

. The district judge denied the petition. Respondent appealed the order to the United States Court of Appeals for the Third Circuit, which reversed the district court and issued the writ on the grounds that respondent's Sixth Amendment rights had been violated by a conflict of interest arising out of the dual representation, by Peruto and DiBona, of respondent and his co-defendants.

FACTUAL HISTORY

At trial the Commonwealth adduced the following evidence in support of charges against John Sullivan:

Francis McGrath, then employed as a janitor by Local 107, Teamsters Union, arrived at Union Headquarters at 105 Spring Garden Street in Philadelphia at approximately 5:15 P.M. on June 17, 1966. He drove into the parking lot and parked his car. He observed other cars parked on the lot, one being John Sullivan's and another being John Rispo's. (N.T. trial, 677-678) He testified he saw and spoke to John Sullivan, who was at that time a delinquent accounts

collector for the Union. Sullivan had been talking on the telephone, and when he hung up, he asked the janitor what he was doing there. McGrath explained that he had not come in on Thursday, the day before, although Thursday was his normal cleaning day, (N.T. trial, 677) and that there had been complaints about his cleaning He therefore decided to come in on this day, Friday, instead. McGrath said he and Sullivan together observed John Gorey and Rita Janda arrive in the parking lot, and shortly afterward McGrath and Gorey had a conversation out of the presence of Sullivan during which time Gorey told McGrath that there were complaints made to the effect that the janitor had not been keeping the building clean. (N.T. trial 832). McGrath said Gorey then left and Sullivan then came into the room which he (McGrath) was cleaning, and suggested that he let the cleaning go until after the meeting took place on Sunday. McGrath then talked to Sullivan about his conversation with Gorey. While they were talking, Gregory Carchidi, also a janitor for the Union, entered.

(N.T. trial 692). McGrath then brought up the subject of the cleaning and told Carchidi what Gorey had relayed to him. Carchidi made a similar suggestion to let the cleaning go until after the meeting on Sunday. Sullivan had already left the room when this portion of the conversation took place. (N.T. trial 693, 836). McGrath said that he then heard loud noises like firecrackers. Carchidi, according to McGrath's testimony, said "Get out of the building and don't say nothing." whereupon McGrath did exactly that. McGrath testified that there were at least six ways of getting upstairs to the second floor from the ground floor of the building. (N.T. trial, 592).

On his way out, McGrath stopped to have a conversation with one Nicholas Franks who was standing on the sidewalk near Gorey's second floor office. (N.T. trial 697, 849). Others were standing nearby also. McGrath said Sullivan's car and Rispo's were still on the parking lot, and this time he observed Carchidi's car as well. The janitor said he returned later and found that all the offices had been

locked, the lights turned off, and the building deserted. He thereupon removed evidence indicating that he had been in the building, and without checking any of the rooms in the building, he left for the second time that evening. The bodies of Gorey and Janda were found the next morning in Gorey's second floor office. No eyewitness evidence nor physical evidence of any nature was ever found linking Sullivan to the murders. Nothing found on his person or among his effects supplied any inference that he had ever been in John Gorey's office. No murder weapons were ever discovered, and no scientific evidence of any nature was found which would tend to prove circumstantially that Sullivan committed the crime. On November 3, 1966 Sullivan and Carchidi as well as Anthony DiPasquale were arrested and charged with these crimes. Carchidi and DiPasquale were both acquitted subsequent to Sullivan's convictions as herein detailed.

REASONS FOR DENYING THE PETITION

I. Even if Disagreement exists among the circuits in determining the standard for review in cases of conflicts of interest for Sixth Amendment purposes, the instant case is not emblematic of that disagreement and therefore presents no issue warranting this Court's attention.

Notwithstanding petitioners' assertion (petitioners' brief p. 13), the standard for determining conflicts of interest in the Sixth Amendment context utilized by the Third Circuit is not unique. To the contrary, that standard is in fundamental agreement with six other circuits. Additionally, the law of the Commonwealth of Pennsylvania, under which the respondent was tried, reflects the standard utilized in the Third Circuit. Finally there can be no question that the result reached by the Third Circuit would be unaffected by application of the strictest existing standard. The conclusion that

respondent was denied effective assistance of counsel at his trial is amply supported by evidence of an actual conflict of interest by which respondent was prejudiced.

The cases cited by petitioners to support the proposition that only the Third Circuit, the District of Columbia Circuit, and possibly the Eighth Circuit require minimal proof of a conflict of interest in order to find a Sixth Amendment violation do not support that proposition. The majority rule in the circuit courts requires that an actual conflict and/or prejudice in fact need only be shown where a valid waiver of the right to be singly represented occurred at trial level. The bulk of cases cited by petitioners are, upon close scrutiny, cases in which the circuit courts have attempted to define the components of an effective waiver, without reaching the merits of the underlying Sixth Amendment claim. It is in the standard for determining a waiver of the right to be

singly represented that the circuit courts diverge, and not in determining what constitutes a conflict of interest in the absence of such a waiver. See, e.g., United States v. Foster, 469 F.2d 1 (1st Cir. 1972) (trial judge under duty to inquire into joint representation; where such inquiry is not of record, government has burden of showing unlikelihood of prejudice by a preponderance of the evidence); Kaplan v. Bombard, 573 F.2d 708 (2nd Cir. 1978) (even if there is an effective waiver, court may find Sixth Amendment violation if actual prejudice is shown); United States v. Carrigan, 543 F.2d 1053 (2nd Cir. 1976) (actual conflict of interest prejudiced defendant despite an effective waiver); United States v. Atkinson, 565 F.2d 1283 (4th Cir. 1977), cert. denied, 98 S.Ct. 2845 (1978) (constructive waiver found by defendant's decision to continue with same counsel); United States v. Mandell, 525 F.2d 671 (7th Cir. 1975) (duty of effectuating

waiver for jointly represented defendants is upon the bar, rather than the court); Austin v. Erickson, 477 F.2d 620 (8th Cir. 1973) (court under affirmative duty to inquire into joint representation; where no inquiry appears of record, waiver will not be presumed); Lollar v. United States, 376 F.2d 243 (D.C. Cir. 1967) (where no effective waiver, the burden is on government to show no conflict of interest beyond a reasonable doubt). In these cases, the difficulty has been in determining whether a Johnson v. Zerbst, 304 U.S. 458 (1938) type of waiver is required, or whether some lesser standard of waiver will make the consent to joint representation effective.

In the instant case, the question of the respondent waiving his right to be effectively represented by counsel who also represented his co-defendants has never been at issue. At no time was an inquiry conducted at trial level, directed toward advising

the respondent of the dangers and difficulties inherent in dual representation.

John Sullivan was represented by two attorneys who also represented his co-defendants. All three defendants, Sullivan, Carchidi, and DiPasquale were tried separately, so in that sense there was dual representation. Both within and outside of the courtroom, however, respondent was jointly represented with his co-defendants by the two attorneys who made decisions that affected all three. The strategies and conduct of Sullivan's defense were decided in group meetings where the co-defendants actively participated. Decisions not to put on a defense for Sullivan, decisions not to testify, were made in joint meetings of counsel and co-defendants. The interests of the co-defendants, who had yet to be tried, informed this decision-making process as much as the interests of the respondent himself.

Indeed, one of the attorneys, Mr. Peruto, testified at post conviction proceedings that the decision not to put on a defense was a decision not to expose the defense of his other two clients.

Respondent was never warned of the dangers inherent in such representation, and in no way agreed to forego his right to be effectively represented. The circuit court decisions cited by petitioners are therefore irrelevant. The Third Circuit standard for determining a conflict of interest "however remote"[2] is established in the absence of an effective waiver to a conflict of interest by the respondent. Under these circumstances, the standard applied is eminently reasonable. It is the identical standard which triggers the need for an on-record colloquy in the circuits which require such a colloquy at

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[2] Walker v. United States, 422 F.2d 374 at 375 (3rd Cir. 1969) cert. denied 399 U.S. 915 (1970).

trial level. In adopting the trial level colloquy/waiver of single representation, the First Circuit stated that the rule was designed "to accomplish ( ) an essentially similar result" as the reversal rule where such a colloquy does not occur. United States v. Foster, 469 F.2d 1, at 5 (1st Cir. 1972). See also United States v. Corrigan, 543 F.2d 1053 (2nd Cir. 1976) (potential conflict triggers the need for an on record waiver of single representation.)

Only four circuits require a showing of actual conflict of interest[1] in the absence of

---

[2] Although the terms "actual conflict" and "actual prejudice" are often used synonymously in this line of decisions, the constitutionally mandated rule requires that when an actual conflict of interest is shown, no inquiry into the degree of prejudice need follow. See Holloway v. Arkansas, 435 U.S. 475 (1978). This much is conceded by petitioners (pet. brief p. 15).

an informed waiver of single representation. See, e.g., Haggard v. State of Alabama, 550 F.2d 1019 (5th Cir. 1977); Thacher v. Bordenkircher, 590 F.2d 640 (6th Cir. 1979); Watkins v. Wilson, 408 F.2d 351 (9th Cir. 1969); McHenry v. United States, 420 F.2d 927 (10th Cir. 1970). Respondent urges that the most burdensome of these standards could not alter the conclusion reached by the court below, that respondent was denied effective assistance of counsel who were burdened by a conflict of interest. The language of the decision below requiring only "the possibility of a conflict, however remote" tends to obscure the fact that respondent's two trial counsel, who also represented respondent's co-defendants, had, in fact, a conflict of interest.

The definition, in the Fifth Circuit, of a conflict of interest is articulated in Foxworth v. Wainwright, 516 F.2d 1072 (5th Cir. 1975). That court defined a conflict of interest as that which is:

> "...present whenever one defendant stands to gain significantly

> by counsel adducing probative evidence or advancing plausible arguments that are damaging to the cause of a co-defendant whom counsel is also representing." Foxworth, at 1076.

The Court additionally noted:

> "It must be remembered that in cases involving conflicts of interest, the conflict does not always appear full blown on the record, since counsel throughout may endeavor to reconcile the conflict." Id., at 1080, citing

Austin v. Erickson, 477 F.2d 620 (8th Cir. 1972).

Both statements apply to John Sullivan. His trial attorneys orchestrated his defense in deference to the interests of his two co-defendants whom they also represented. Because the three defendants were tried separately, yet jointly represented otherwise, the conflict does not appear full blown on the trial record, but is amplified by the post conviction record.

Both co-defendants were subsequently acquitted of the charges, although respondent was convicted. The Pennsylvania Supreme Court split three to three on the issue of whether

there was evidence against Sullivan sufficient to support his conviction. Where the evidence was, as the lower court found, "scant", any doubt as to competency must be resolved in favor of the respondent. In such a close case the reluctance of trial counsel to put on a defense, including the calling of witnesses known to be nearby, and motivated by a concern for the other defendants, actually prejudiced the interests of John Sullivan.

Respondent contends, therefore, that under any current standard of review, his Sixth Amendment right to effective assistance of counsel was curtailed by an actual conflict of interest. The petition for certiorari presents no issue warranting the review of this Court.

II. Because the question of state action for Sixth and Fourteenth Amendment purposes appears for the first time in the petition for writ of certiorari, petitioners have waived their right to raise it here, and therefore no cognizable issue is presented to warrant review by this Court.

The petitioners argue (petitioners' brief pp. 20-29) that in the absence of an actual conflict of interest, there is no state action for a Sixth Amendment claim where a state prisoner was represented at trial by privately retained counsel. An allegation of absence of state action was never briefed or argued to the courts below. As a result, the petitioners have waived their right to raise the issue here. The allegation that no Sixth Amendment violation occurred because no state action was involved has not been preserved for review by this Court.

It has been established that this Court will not consider issues presented for the first time in a petition for writ of

certiorari. United States v. Ortiz, 422 U.S. 891 (1975), at 898. Nor will this Court decide an issue where it is unclear from the record that it was presented below. Ramsey v. United Mine Workers of America, 401 U.S. 302 (1971) at 312.

Even had the issue been presented in the court below, it could not have been decided adversely to the respondent, since the state court was at all times aware that Mr. Sullivan's attorneys also represented his two co-defendants. Both trial counsel entered appearances for all three defendants at the same time. One of the attorneys, Mr. DiBona, referred to Gregory Carchidi as his other client at the beginning of respondent's trial. Mr. Peruto, the other attorney, referred to DiPasquale as his other client (N.T. Trial, May 11, 1967, p. 3, at appendix 47C). That Mr. Sullivan was tried separately in no way abscured the fact that he was represented by two attorneys who also provided representation for his co-defendants.

In this context, the Third Circuit has held:

> "The action of the trial judge in permitting the case to go forward without so much as an inquiry as to potential harm ... is the state action complained of." Unites States ex rel. Hart v. Davenport, 478 F.2d 203 (3rd Cir. 1973) at 211.

In the second place, the distinction urged by petitioners between court appointed and privately retained counsel has been explicitly rejected by the Third Circuit:

> "A rule which would apply one Fourteenth Amendment test to assigned counsel and another to retained counsel would produce the anomaly that the non-indigent, who must retain an attorney if he can afford one, would be entitled to less protection from the trial court." Hart v. Davenport, supra, at 211.

The petitioners have foregone the right to raise this issue. Had it been raised, it would have resulted in a finding of state action.

Petitioners concede that a showing of actual conflict of interest disposes of the question of state action. Respondent asserts further that an actual conflict of interest existed, and that this is dispositive of the

entire matter.

At least one of Mr. Sullivan's two trial attorneys, Mr. Peruto refrained from putting on a defense because he did not want to expose the defense of the other two defendants, Carchidi and DiPasquale. The notes of testimony of the post conviction hearing bear out this view:

"Q. Wait just a minute, sir. You were concerned with the other two defendants you represented, is that correct?

A. (By Mr. Peruto) Yes. Why expose your defense if you have got two more people to come to trial and the Commonwealth has not presented a case?

Q. So that entered into your consideration as to whether or not you presented a defense in the Sullivan case?

A. Sure it did." (N.T. post conviction, April 25, 1974, p. 101, appendix at 48C).

Even if only one of respondent's two trial attorneys perceived conflicted motives in himself for failing to put on a defense, that attorney also represented the other two defendants, and provided extensive representation for the respondent at his trial. As the Third Circuit opined:

"We believe that an attorney who enters an appearance on behalf of a criminal defendant, consults with him confidentially for the purpose of preparing a defense, investigates his case, aids in the pretrial preparation of his defense, appears at his trial, participates in the selection of the jury that is to decide his fate, argues motions and objections, confers with co-counsel on trial strategy, offers the defendant legal advice, including advice on whether he should testify or present evidence in his defense, and argues the issue of penalty, a matter of life and death, to the jury on the defendant's behalf must be said to represent that defendant and owe to him all the duties an attorney owes to a client in a criminal case." (Appendix, at 11B.)

Since the Third Circuit ruled as a matter of law that dual representation did exist, the issue of whether an actual conflict of interest attended upon this dual representation is easily resolved. Mr. Peruto's testimony at post conviction proceedings in 1975 is buttressed by the trial record in 1967. For example, a statement by Gregory Carchidi was entered into evidence at Mr. Sullivan's trial as the statement of a co conspirator.[1]

---

[3] This statement was found admissible, on first review by the Pennsylvania Supreme Court, as res gestae, or excited utterance. Commonwealth v. Sullivan, 446 Pa. 419 (1971) at 439.

Since Mr. Peruto also represented Carchidi, he was placed in the position of deciding whether to call Carchidi to rebut the inference, or allowing the inference to remain uncontradicted. In choosing the former, Peruto would have been required to provide representation for Carchidi as to his Fifth Amendment privilege. Instead he chose Carchidi's right to remain silent at the expense of Sullivan's defense. At Sullivan's trial Mr. Peruto demonstrated the extent of the conflict:

"Peruto: You put me in this position; a statement by Carchidi offered into evidence and can only be refuted by Carchidi.

The Court: It is the law because a defendant refuses to testify he can't offer something.

Peruto: The defendant can testify, but how can he testify to what Carchidi said and you can't put Carchidi on the record." (N.T. trial, June 13, 1967, p. 672, appendix at 58C).

Mr. Peruto also failed to put exculpatory witnesses on the stand at respondent's trial to protect Carchidi and DiPasquale who,

Mr. Peruto said, may have been seen on the night of the crimes. He testified:

"Q. Did you advise the defendant Sullivan when you were considering whether or not to put on a defense that these three witnesses were available and could help this defense?

A. I don't recall advising him of that, but I do recall that I felt that it might be dangerous because one of the other two defendants leaving in a hurry might have been seen by those witnesses and it might have come out on the cross-examination of those witnesses in Sullivan's case." Appendix at 58C.

The state of the record indicates that Mr. Peruto's perceptions were correct. An actual conflict of interest was created by trial counsel's representation of respondent and his co-defendants.

In the presence of such a conflict, the allegation that dual representation by retained counsel presents no state action for review by a federal forum becomes irrelevant. Additionally state action, indicated by the knowledge of the trial court that Sullivan's attorneys also represented his co-defendants, is unquestionably present, regardless of whether an actual

conflict of interest has been shown. Finally, petitioners have waived their right to argue lack of state action in respondent's Sixth Amendment claim, by failing to raise it at any point below. Therefore, it is urged that no issue has been preserved requiring the review of this Court.

III. The court below decided two issues of law, relying upon facts found by the state courts, and therefore violated no principle of comity or of habeas corpus review which warrant the attention of this Court.

There were two issues of law before the Court: (1) was respondent dually represented at his trial by counsel who also represented his co-defendants, and (2) did this dual representation deny respondent effective assistance of counsel under the applicable standards for such a determination?

The court below answered both questions affirmatively. In so doing, the court utilized the record as it had been developed in the Pennsylvania state court system. Although

the court below disagreed with the findings of the Pennsylvania Supreme Court on the issue of dual representation, it held:

> "Properly speaking the Supreme Court's conclusion that there was no dual representation was not a finding of fact but a legal conclusion - the application of a legal standard to the facts developed on the record." United States ex.rel Sullivan v. Cuyler, 593 F.2d 512 (3rd Cir. 1979).

The court below relied on the facts in the record in reaching a different legal conclusion. This reliance was compelled by Townsend v. Sain, 372 U.S. 293 (1963) in which this Court held that in petitions for habeas corpus:

> "...Although the district judge may, where the state court has reliably found the relevant facts, defer to the state court's findings of fact, he may not defer to its findings of law. It is the district judge's duty to apply the applicable federal law to the state court findings independently." Townsend v. Sain, supra, at 318.

The state court never reached the Sixth Amendment claim because it concluded there was no dual representation. Even if it had, the court below had no obligation to defer to the findings of fact of the state supreme court.

Moreover, even the state supreme court found incompetence of counsel for failure to protect respondent's appellate rights. Commonwealth v. Sullivan, supra, 472 Pa. at 145, appendix 17D. Additionally, the standard used by the court below to determine the Sixth Amendment violation regarding a conflict of interest is identical to the standard applied in the Pennsylvania courts. Commonwealth ex rel. Whitling v. Russell, 406 Pa. 45, 170 A.2d 641 (1962); Commonwealth v. Werner, 217 Pa. Super. 49, 268 A.2d 195 (1970).

CONCLUSION

For all of the foregoing reasons, it is respectfully requested that the petition for writ of certiorari to the United States Court of Appeals for the Third Circuit be denied.

Respectfully submitted,

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IN THE

SUPREME COURT OF THE UNITED STATES

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October Term, 1979

No. 78-1832

JULIUS T. CUYLER, SUPERINTENDENT
and
DISTRICT ATTORNEY OF PHILADELPHIA,
Petitioner

v.

JOHN SULLIVAN,
Respondent

BRIEF FOR PETITIONER

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INDEX

	Page
Opinions Below	1
Jurisdiction	1
Questions Presented	2
Constitutional and Statutory Provisions Involved	2
Statement	4
Summary of Argument	11
Argument:	
I. The Third Circuit improperly vacated respondent's Pennsylvania murder and conspiracy convictions upon its finding that there was a possibility of conflict of interest, however remote, resulting from the joint representation of respondent and his two co-defendants by the same two attorneys	14
II. Because the Sixth Amendment violation alleged below was not caused or fostered by state action, the Third Circuit erroneously found that violation to be an appropriate ground for issuing the writ of habeas corpus	36
III. The Third Circuit transgressed appropriate limits of appellate review by making *de novo* findings of fact and credibility based solely upon its assessment of the record of the state court hearing	42
Conclusion	47
Addendum	48

TABLE OF AUTHORITIES

Cases: Page

Allen v. Board of Elections, 393 U.S. 544 (1969) 41

Austin v. Erickson, 477 F.2d 620 (8th Cir. 1973) 31

Bellotti v. Baird, 428 U.S. 132 (1976) 41

Beran v. United States, 580 F.2d 324 (8th Cir. 1978), *cert. denied*, 99 S. Ct. 1422 (1979) 31

Blonder Tongue Laboratories, Inc. v. University of Illinois Foundation, 402 U.S. 313 (1971) 41

Boykin v. Alabama, 395 U.S. 238 (1969) 35

Brown v. Allen, 344 U.S. 443 (1953) 43

Church v. Hubbart, 6 U.S. (2 Cranch) 187 (1804) .. 40

Colon v. Fogg, 603 F.2d 403 (2d Cir. 1979) 34

Commonwealth v. Myers, 472 Pa. 200, 371 A.2d 1279 (1977) 39

Commonwealth v. Napper, 254 Pa. Super. Ct. 54, 385 A.2d 521 (1978) 29, 45

Commonwealth v. Williams, 457 Pa. 502, 327 A.2d 15 (1974) 39

Davidson v. Cupp, 446 F.2d 642 (9th Cir. 1971) 31

Duignan v. United States, 274 U.S. 195 (1927) 41

Dukes v. Warden, 406 U.S. 250 (1972) 24, 25, 26

Duncan v. Louisiana, 391 U.S. 145 (1968) 36

Durfee v. Duke, 375 U.S. 106 (1963) 40

Fitzgerald v. Estelle, 505 F.2d 1334 (5th Cir. 1974), *cert. denied*, 422 U.S. 1011 (1975) 38

Flagg Brothers, Inc. v. Brooks, 436 U.S. 149 (1978) .. 36

Cases: Page

Foxworth v. Wainwright, 516 F.2d 1072 (5th Cir. 1975) 31, 38

Fryar v. United States, 404 F.2d 1071 (10th Cir. 1968), *cert. denied*, 395 U.S. 964 (1969) 31

Garton v. Swenson, 497 F.2d 1137 (8th Cir. 1974) ... 38

Glasser v. United States, 315 U.S. 60 (1942) .. 24, 25 26, 27, 35

Haggard v. Alabama, 550 F.2d 1019 (5th Cir. 1977) .. 31

Holloway v. Arkansas, 435 U.S. 475 (1978) ..... *passim*

Kallie v. Beto, 353 F. Supp. 966 (S.D. Tex. 1973), *aff'd sub nom. Kallie v. Estelle*, 515 F 2d 588 (5th Cir.), *cert. denied*, 423 U.S. 1019 (1975) 37

Kaplan v. Bombard, 573 F.2d 708 (2d Cir. 1978) 30

Labine v. Vincent, 401 U.S. 532 (1971) 36

Lacaze v. United States, 457 F.2d 1075 (5th Cir.), *cert. denied*, 409 U.S. 921 (1972) 37

LaFleur v. Hall, 383 F. Supp. 1188 (D. Mass. 1974) .. 34

LaVallee v. Delle Rose, 410 U.S. 690 (1973) 42, 44

Loukas v. Johnson, 453 F.2d 407 (6th Cir. 1972) .. 29, 37, 40, 45

Merrill Lynch, Pierce, Fenner and Smith, Inc. v. Ware, 414 U.S. 117 (1973) 36

Messelt v. Alabama, 595 F.2d 247 (5th Cir. 1979) ... 39

Miller v. United States, 564 F.2d 103 (1st Cir. 1977), *cert. denied*, 435 U.S. 931 (1978) 40

Moragne v. State Marine Lines, Inc., 398 U.S. 375 (1970) 41

Neil v. Biggers, 409 U.S. 188 (1972) 43

Cases: Page

Opie v. Meacham, 293 F. Supp. 647 (D. Wyo. 1968), *aff'd*, 419 F.2d 465 (10th Cir. 1969), *cert. denied*, 399 U.S. 927 (1970) 37

People v. Cook, 13 Cal. 3d 663, 119 Cal. Rptr. 500, 532 P.2d 148, *cert denied*, 423 U.S. 870 (1975) 38

People v. Gomberg, 38 N.Y.2d 307, 397 N.Y.S.2d 769, 342 N.E.2d 550 (1975) 38

People v. Mitchell, 411 Ill. 407, 104 N.E.2d 285, *cert. denied*, 343 U.S. 969 (1952) 40

Pirillo v. Takiff, 462 Pa. 511, 341 A.2d 896 (1975), *cert. denied*, 423 U.S. 1083 (1976) 26

Plaskett v. Page, 439 F.2d 770 (10th Cir. 1971) 37

Powell v. Texas, 392 U.S. 514 (1968) 36

Procunier v. Navarette, 434 U.S. 555 (1978) 41

Root v. Cunningham, 344 F.2d 1 (4th Cir.), cert. *denied*, 382 U.S. 866 (1965) 37

Rose v. Mitchell, 99 S. Ct. 2993 (1979) 41

Salomon v. LaVallee, 575 F.2d 1051 (2d Cir. 1978) .. 34

Shaw v. Henderson, 303 F. Supp. 183 (E.D. La. 1969), *aff'd*, 430 F.2d 1116 (5th Cir. 1970) 37

Silber v. United States, 370 U.S. 717 (1962) 41

State v. Jeffrey, 162 Mont. 92, 515 P.2d 364 (1973) .. 38

Thacker v. Bordenkircher, 590 F.2d 640 (6th Cir.), *cert. denied*, 99 S. Ct. 2827 (1979) 31,36

Townsend v. Sain, 372 U.S. 293 (1963) .. 18, 42, 43, 44

United States v. Alvarez, 580 F.2d 1251 (5th Cir. 1978) 39

Cases: Page

United States v. Atkinson, 565 F.2d 1283 (4th Cir. 1977), *cert. denied*, 436 U.S. 944 (1978) 30

United States v. Bosch, 584 F.2d 1113 (1st Cir. 1978) 38

United States v. Bubar, 567 F.2d 192 (2d Cir.), *cert. denied*, 434 U.S. 872 (1977) 37

United States v. Carrigan, 543 F.2d 1053 (2d Cir. 1976) 30

United States v. Foster, 469 F.2d 1 (1st Cir. 1972) 23, 30

United States v. Lawriw, 568 F.2d 98 (8th Cir. 1977), *cert. denied*, 435 U.S. 969 (1978) 32

United States v. Mandell, 525 F.2d 671 (7th Cir. 1975), *cert. denied*, 423 U.S. 1049 (1976) 31, 34

United States v. Martorano, 457 F. Supp. 803 (D. Mass. 1978) 21-22

United States v. Riebold, 557 F.2d 397 (10th Cir.), *cert. denied*, 434 U.S. 860 (1977) 37

United States v. Rodriguez Vallejo, 496 F.2d 960 (1st Cir.), *cert. denied sub nom.* Vallejo v. United States, 419 U.S. 965 (1974) 37, 39

United States v. Speers, 382 U.S. 266 (1965) 41

United States v. Timmreck, 99 S. Ct. 2085 (1979) .. 34

United States v. Woods, 544 F.2d 242 (6th Cir. 1976), *cert. denied*, 430 U.S. 969 (1977) 31

United States ex rel. Hart v. Davenport, 478 F.2d 203 (3d Cir. 1973) 34, 37, 38

Cases:

	Page
United States ex rel. McClindon v. Warden, 575 F.2d 108 (7th Cir.), *cert denied*, 439 U.S. 856 (1978)	31
United States ex rel. McNair v. New Jersey, 492 F.2d 1307 (3d Cir. 1974)	42
United States ex rel. Morgan v. Keve, 425 F. Supp. 585 (D. Del. 1976)	19
Walker v. United States, 422 F.2d 374 (3d Cir.), *cert. denied*, 399 U.S. 915 (1970)	18, 19, 34
Watkins v. Wilson, 408 F.2d 351 (9th Cir. 1969)	31
Williams v. Estelle, 416 F. Supp. 1073 (N.D. Tex. 1976)	37
Williams v. United States, 401 U.S. 675 (1971)	36
Williams v. United States, 304 F. Supp. 691 (E.D. Mo. 1969)	37
Youakim v. Miller, 425 U.S. 231 (1976)	41
Zuck v. Alabama, 588 F.2d 436 (5th Cir. 1979), *petition for cert. filed*, 47 U.S.L.W. 3829 (U.S. May 21, 1979) (No. 78-1741)	39, 40

Constitutional and Statutory Provisions:

United States Constitution, Amendment VI	*passim*
United States Constitution, Amendment XIV, §1	2
28 U.S.C. 2254(d)	3, 42

Federal Rule:

Fed. R. Crim. P. 11	34

Miscellaneous:

	Page
ABA Code of Professional Responsibility DR5-105	29
ABA Standards Relating to the Administration of Criminal Justice—*The Defense Function*, Standard 4-3.5 (Approved Draft 1979)	33
ABA Standards Relating to the Administration of Criminal Justice—*The Function of the Trial Judge*, §3.4(b) (Approved Draft 1972	33
ABA Standards Relating to the Administration of Criminal Justice—*Special Functions of the Trial Judge*, Derivation Table (Approved Draft 1978)	33
Annot., 74 A.L.R.2d 1384 (1960)	37
Comment, *Conflicts of Interests in Multiple Representation of Criminal Co-Defendants*, 68 J. Crim. L.&C. 226 (1978)	29
Farrand, 1 Records of the Federal Convention of 1787 (Yale 1966)	36
Geer, *Representation of Multiple Criminal Defendants: Conflicts of Interest & the Professional Responsibilities of the Defense Attorney*, 62 Minn. L. Rev. 119 (1978)	29
Hyman, *Joint Representation of Multiple Defendants in a Criminal Trial: The Court's Headache*, 5 Hofstra L. Rev. 315 (1977)	29
Lowenthal, *Joint Representation in Criminal Cases: A Critical Appraisal*, 64 Va. L. Rev. 939 (1978)	29
Note, *Ensuring Effective Assistance of Counsel for the Criminal Co-Defendant*, 37 La. L. Rev. 1289 (1977)	29

Miscellaneous: Page

Preliminary Draft of Proposed Amendments to The Fed. R. Crim. P., 77 F.R.D. 507 (1978) (Proposed Amendment to Fed. R Crim. P. 44(c), postponed by Pub. L. 95-42, July 31, 1979, 93 Stat. 326) .. 32, 33, 34

Tague, *Multiple Representation & Conflicts of Interest in Criminal Cases*, 67 Geo. L.J. 1075 (1979) 29

Wanat, *Conflicts of Interest in Criminal Cases and the Right to Effective Assistance of Counsel—The Need for Change*, 10 Rut.-Cam. L.J. 57 (1978) .. 29

IN THE
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October Term, 1979

No. 78-1832

JULIUS T. CUYLER, SUPERINTENDENT
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DISTRICT ATTORNEY OF PHILADELPHIA,
Petitioner

v.

JOHN SULLIVAN,
Respondent

BRIEF FOR PETITIONER

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1B-21B and 1A-5A) is reported at 593 F.2d 512. The opinion of the Supreme Court of Pennsylvania (Pet. App. 1D-70D) is reported at 472 Pa. 129, 371 A.2d 468.

JURISDICTION

The judgment of the court of appeals was entered on February 14, 1979. A petition for rehearing *en banc* was timely filed and denied on March 12, 1979. The petition for a writ of certiorari was filed on June 7, 1979, and was granted on October 1, 1979. The jurisdiction of this Court rests upon 28 U.S.C. §1254(1).

QUESTIONS PRESENTED

I. Whether the Third Circuit improperly vacated respondent's Pennsylvania murder and conspiracy convictions upon its finding that there was a possibility of conflict of interest, however remote, resulting from the joint representation of respondent and his two co-defendants by the same two attorneys.

II. Whether because the Sixth Amendment violation alleged below was not caused or fostered by state action, the Third Circuit erroneously found that violation to be an appropriate ground for issuing the writ of habeas corpus.

III. Whether the Third Circuit transgressed appropriate limits of appellate review by making *de novo* findings of fact and credibility based solely upon its assessment of the record of the state court hearing.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

United States Constitution, Amendment Six.

In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defense.

United States Constitution, Amendment Fourteen, Section 1.

All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No

State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

The United States Code, Act of June 25, 1948. c. 646, 62 Stat. 967; As Amended Nov. 2, 1966, Pub. L. 89-711, §2, 80 Stat. 1105, 28 U.S.C. §2254(d).

(d) In any proceeding instituted in a Federal court by an application for a writ of habeas corpus by a person in custody pursuant to the judgment of a State court, a determination after a hearing on the merits of a factual issue, made by a State court of competent jurisdiction in a proceeding to which the applicant for the writ and the State or an officer or agent thereof were parties, evidenced by a written finding, written opinion, or other reliable and adequate written indicia, shall be presumed to be correct, unless the applicant shall establish or it shall otherwise appear, or the respondent shall admit—

(1) that the merits of the factual dispute were not resolved in the State court hearing; . . .

(8) or unless that part of the record of the State court proceeding in which the determination of such factual issue was made, pertinent to a determination of the sufficiency of the evidence to support such factual determination, is produced as provided for hereinafter, and the Federal court on a consideration of such part of the record as a whole concludes that such factual determination is not fairly supported by the record:

And in an evidentiary hearing in the Federal court, when due proof of such factual determination has been made, unless the existence of one or more of the circumstances respectively set forth in paragraphs numbered (1) to (7), inclusive, is shown by the applicant, otherwise appears, or is admitted by the respondent, or unless the

court concludes pursuant to the provisions of paragraph numbered (8) that the record in the State court proceedings, considered as a whole, does not fairly support such factual determination, the burden shall rest upon the applicant to establish by convincing evidence that the factual determination by the State court was erroneous.

STATEMENT

This Court granted the petition for certiorari to review the decision of the Third Circuit issuing a writ of habeas corpus, on the ground that respondent John Sullivan was deprived of his Sixth Amendment right to the effective assistance of counsel. The Third Circuit based its decision upon a finding of a potential conflict of interest, however remote, caused by the joint representation of Sullivan and two co-defendants by two retained counsel.[1] In granting relief, the Third Circuit reversed the District Court's denial

1. In their dissent from the denial of reargument *en banc*, three judges of the Third Circuit characterized this case as involving dual representation, because the defendants herein were not tried jointly. Other courts have made varying uses of the terms dual and joint representation. To avoid undue confusion, this brief will use the term joint representation to denote all forms of multiple representation of co-defendants in criminal cases. Where the question of joint or separate trials of the co-defendants is of distinct relevance to the analysis, it will be specifically discussed.

References to the Appendix to this brief will be designated (A.). References to the opinions of the courts below, reprinted in full in the Appendix to the Petition for Certiorari, will be designated (Pet. App.); the published opinions of the Pennsylvania Supreme Court and the Third Circuit will also be cited. References to portions of the record not reproduced in the Appendix will be appropriately designated (e.g., Trial, Hearing) and the date noted.

of the writ and overruled state court findings that no conflict of interest had been established.[2]

The Third Circuit's decision was founded upon testimony presented at an evidentiary hearing in state court, pursuant to Sullivan's petition for collateral post-conviction relief. Upon review of that testimony, the Third Circuit ruled that two strategic trial decisions, that Sullivan not take the stand and that no other defense witnesses be called, although reasonably based, were possibly influenced by a potential conflict of interest arising out of counsel's joint representation of two co-defendants awaiting trial following disposition of Sullivan's case (Pet. App. 12B-20B; 593 F.2d at 519-523).

1. Sullivan's Decision Not to Testify

Following their indictment, the three defendants retained G. Fred DiBona, Esquire, now a judge of the Phila-

2. Sullivan was convicted on two counts of murder in the first degree in June, 1967, after a jury trial in the Court of Common Pleas, Philadelphia County, and was subsequently sentenced to two consecutive terms of life imprisonment. The convoluted procedural history of this case, and a review of the evidence presented at trial, are set forth in the opinion of the Third Circuit (Pet. App. 2B-8B; 593 F.2d at 515-517).

In brief, Sullivan and two co-defendants, Gregory Carchidi and Anthony DiPasquale, were indicted for the assassination-style killings of John Gorey, an official of Local 107 of the Teamster's Union, and his companion Rita Janda, inside Gorey's office at the union hall on Friday evening, June 17, 1966. Francis McGrath, a janitor, testified that when he arrived for work about 6:00 p.m., he found Sullivan sitting by a window of a second floor office. McGrath ignored Sullivan's advice to postpone the cleaning until Sunday, and was working in the conference room when Gorey and Janda arrived. Sullivan, joined by Carchidi, again unsuccessfully urged McGrath to depart. Shortly after Sullivan left the room, McGrath heard what sounded to him like "firecrackers going off in rapid succession," and asked Carchidi "What was that?" Carchidi told McGrath to "Get out of the building and don't say nothing." The bullet-riddled bodies were discovered the next morning (Pet. App. 5B-8B; 593 F.2d at 516-517).

delphia Court of Common Pleas, and A. Charles Peruto, Esquire. According to Peruto, Sullivan chose Judge DiBona as his chief trial counsel, with Peruto assisting him, while the other two co-defendants, who were to be separately tried, selected Peruto as chief counsel (A. 54a, 57a-58a, 73a-74a, 203a).[3]

At the state court evidentiary hearing on the conflict of interest claim, Judge DiBona testified that following the prosecution's case he, Peruto, and Sullivan conferred for one and one-half to two hours before deciding not to present a defense. Both counsel advised Sullivan that the prosecution's circumstantial case was, in their opinion, insufficient to support conviction by the jury. According to Judge DiBona, Sullivan did not want to take the stand, against DiBona's strong recommendation that he testify, while Peruto suggested various reasons why such action might be dangerous. After discussing the matter overnight with his brother and other members of the family, Sullivan, acting on his own, "definitely made up his mind that he would not testify" (A. 12a-13a).

Peruto agreed that it was Sullivan himself who made the decision not to testify. At the hearing, Peruto stated that he could not specifically recall which of the two attorneys advised Sullivan not to take the stand, but that he

3. At Sullivan's trial, Judge DiBona examined witnesses and delivered opening and closing arguments. Peruto assisted in the examination of jurors on voir dire, conferred throughout trial with Sullivan and with DiBona, and argued motions and objections. After the verdict was returned, Peruto argued the penalty phase to the jury because DiBona was so upset by the verdict that he was unable to continue; Peruto opened his argument by apologizing for his "eleventh hour entry" into the trial. At the hearing, Sullivan claimed that he did not select Judge DiBona, and did not know that DiBona was to be chief counsel until trial commenced. Carchidi and DiPasquale were subsequently acquitted after trial (A. 46a-47a, 64a-65a, 73a 127a-128a; Pet. App. 8B-12B; 593 F.2d at 517-519; Trial, June 20, 1967).

would accept Judge DiBona's recollection of the conference. Peruto explained that the attorneys were concerned because by taking the stand, Sullivan might enable the prosecutor to elicit that, while at the union hall on the evening of the murders, Sullivan (who was married) had telephoned a girlfriend by whom he had fathered two children, and "I thought [that] might hurt Sullivan more than the benefit that he would get out of putting the testimony on. But it was a value judgment" (A. 57a-60a).

Contradicting both trial counsel, Sullivan testified that he had wanted to take the stand, but that the decision was given to him by Peruto "point blank" after Peruto assured him of acquittal. Sullivan agreed that counsel advised him of the weakness of the prosecution's case, and that Peruto warned him of the danger that cross-examination would elicit his meretricious relationship with his girlfriend, Shirley Davis. Sullivan testified that he rejected the latter argument, explaining that "[m]y motive for not taking the stand was strictly based that there was no evidence that had nothing to do with Shirley Davis" [sic] (A. 100a-106a, 138a, 156a-157a).[4]

The state hearing court rejected Sullivan's assertion that the decision not to testify was forced upon him, finding that the decision was made by Sullivan and counsel after full consultation and was not marred by any question of ineffective assistance (Pet. App. 7F). Affirming the denial of relief, the Pennsylvania Supreme Court found that the decision not to present Sullivan's testimony was reasonably based, and not the product of a conflict of interest (Pet. App. 33D-34D; 472 Pa. at 161-162, 371 A.2d at 483-484). The district court likewise rejected the habeas corpus petition, holding that the state court record refuted

4. Sullivan's co-defendant, Carchidi, testified at the hearing that Sullivan strongly desired to take the stand at trial (A. 198a). Carchidi's assertion was not credited by any of the reviewing courts below.

Sullivan's contention that his failure to testify was influenced by any consideration for the other defendants, and that Sullivan himself made the decision because the evidence was insufficient for conviction, and to avoid embarrassment from the revelation of his "past indiscretions" (Pet. App. 5C-8C).[5]

2. *The Decision Not to Present Other Defense Witnesses*

Crediting the hearing testimony of Judge DiBona, the state courts and the federal district court also rejected Sullivan's second argument, that the decision not to otherwise present a defense was influenced by counsel's desire not to disclose evidence and witnesses prior to the co-defendants' trials. On that question, DiBona testified at the state court hearing that once Sullivan made his decision not to take the stand, "there was no other real good evidence that we had, that I thought should be offered" (A. 21a-22a). Judge DiBona further testified that the decision not to present witnesses was jointly made by counsel and Sullivan, that the decision was not in any way predicated upon a desire to protect the co-defendants, and that he saw no conflicts in the defenses of the three accused (A. 38a-39a, 182a).

In ordering that the writ issue, the Third Circuit found that a potential conflict of interest in defense strategy could have influenced the decision not to call witnesses. The court based its decision upon Peruto's assertions that, because he was certain that Sullivan would be acquitted, he had argued against calling defense witnesses to avoid "exposing" those witnesses prior to the pending trials of

5. The State Supreme Court and the district court also found that since Sullivan and the co-defendants were represented by different chief counsel and were tried separately, there was no "dual representation" under the facts of this case (Pet. App. 33D-34D, 472 Pa. at 161-162, 371 A.2d at 483; Pet. App. 4C-5C).

the remaining two co-defendants (Pet. App. 15B-16B; 593 F.2d at 521).[6]

Rejecting the findings of the lower courts that the decision not to present a defense was a legitimate tactical decision based upon Judge DiBona's sound, and untainted, professional judgment, the Third Circuit instead credited Peruto's testimony, holding that "[n]o reason or evidence is offered to explain why an attorney would make the damaging admission of professional impropriety we have quoted were it not true" (Pet. App. 17B; 593 F.2d at 522).[7] The Third Circuit thus concluded that Sullivan had established "a possibility of prejudice or conflict of interest, however remote," and declined to examine the Commonwealth's argument that no actual conflict or prejudice was ever shown (Pet. App. 18B; 593 F.2d at 522)

In its decision, the Third Circuit also referred to the failure to call co-defendant Gregory Carchidi, who was awaiting trial on the murder indictments, as a defense witness for Sullivan. At the evidentiary hearing, some six years after his acquittal, Carchidi stated that he would have testified at Sullivan's trial, but that both attorneys felt his testimony was unnecessary. At the hearing, counsel for Sullivan elicited only that Carchidi would have testified that he and Sullivan were at the union hall with McGrath

6. The Third Ciruit apparently extrapolated this comment by Peruto, directed solely to the decision not to call other witnesses, and applied it to the separate question of Sullivan's decision not to take the stand (Pet. App. 15B-18B; 593 F.2d at 521-522). At the hearing, however, Peruto testified that he had no recollection of the discussion as to whether Sullivan should testify, and speculated only that he might have advised against so doing because that would have been in keeping with his position on the calling of the other witnesses. Peruto never indicated that any conflict influenced his advice regarding Sullivan's decision not to testify (A. 57a-60a.)

7. The Third Circuit also noted that "Sullivan (albeit not a disinterested witness) corroborates his [Peruto's] testimony" (Pet. App. 17B; 593 F.2d at 522).

on the night of the murders, that he did not remember whether he told McGrath to postpone cleaning the hall, and that he had not told McGrath to "Get out of the building and don't say nothing," but recalled saying, " 'Let's get the hell out' or 'Let me get the hell out,' something like that. I don't recall. All I wanted to do was get out." Carchidi also indicated that only one civilian defense witness was presented at his trial (A. 193a-200a).[8]

Although not discussed by the Third Circuit, evidence relating to other alleged potential defense witnesses was presented at the hearing. In particular, Peruto explained that they did not call Detective McGill, who later testified at Carchidi's trial that McGrath had made statements to police inconsistent with his trial testimony, because the judge at Sullivan's trial refused a defense request for discovery of the notes of the detective's interview with McGrath. At Carchidi's trial, a different judge allowed that discovery, thereby enabling defense access to those notes for the first time (A. 47a-48a).[9]

Additionally, Sullivan testified at the hearing that he had advised counsel that Michael Hessian, a union employee and friend of McGrath, would testify at trial that McGrath had previously denied that Carchidi told him to leave the union hall immediately after the shooting (A. 86a-87a). DiBona explained, however, that after he and

8. At the medical examiner's inquest preceding the indictments, Carchidi had asserted the privilege against self-incrimination and refused to answer any questions (A. 204a-209a).

9. After Carchidi's trial, DiBona filed a coram nobis petition seeking reversal of Sullivan's conviction on the basis of the after-discovered evidence of McGill's testimony. The court denied the petition, ruling that the jurors were aware that McGrath had made inconsistent statements (See Notes of Hearing on Defendant's Petition for Writ of Error Coram Nobis, September 20, 1968).

At the hearing, Sullivan agreed that the detective's notes of his interview with McGrath were not discovered until the Carchidi trial (A. 107a).

Peruto spoke to Hessian, they "concluded that he would be of no value to us as a witness" because he was in fear for his life and did not wish to get involved (A. 22a-23a). Peruto corroborated this testimony, noting that "Mr. Hessian was terribly frightened at the time of the Sullivan trial and we didn't want to put on another witness who we could not rely on a hundred percent" (A. 55a-56a). Hessian did not testify at the hearing.[10]

SUMMARY OF ARGUMENT

I. The Sixth Amendment guarantees that a defendant be accorded the effective assistance of counsel. The Third Circuit construed this guarantee far too broadly in concluding that a state habeas petitioner is entitled to relief if he can establish the possibility, however remote, that his attorney was burdened by a conflict of interest. Application of this standard below has resulted in the improper reversal of state convictions for two murders on federal collateral attack. The facts establish that John Sullivan and two co-defendants retained two lawyers to jointly represent them. Each defendant selected a lead counsel of his choice; the other attorney served as backup counsel. Each defendant was tried separately, Sullivan being tried first. No objection

10. Passing references were made to potential testimony regarding the time of death of the victims, which was rendered moot when the medical examiner testified at trial that they could have been killed as early as 7:15 p.m., a revision of his previous estimates setting a later time of death (A. 32a-34a, 61a-62a).

Peruto also testified that an investigator had told him that witnesses at the scene had seen someone drive away after they heard the shots. Although Peruto stated that he feared that those witnesses might testify that they had seen one of the other two co-defendants leaving the union hall, he omitted mention of the possibility that they had instead seen Sullivan (A. 62a-64a). The putative witnesses were not produced at the hearing, and neither Sullivan nor Peruto indicated the relevance of their testimony, or any possibility that their testimony could have benefitted Sullivan.

to joint representation was made pretrial, nor was any conflict apparent from the record. The first allegation of conflict materialized after conviction, pursuant to Pennsylvania collateral review. There, for the first time, backup counsel testified that his advice to present no defense witnesses was influenced by his concern for the co-defendants. This testimony was contradicted by the testimony of lead counsel. Moreover, not one person was shown to have been available as a viable defense witness. The Third Circuit refused to consider this compelling evidence which established that no actual conflict existed, and granted extraordinary relief because the remote possibility of a conflict existed.

The Third Circuit standard requires the unrestricted granting of extraordinary relief. A federal habeas petitioner should be required to establish that an actual conflict of interest existed which violated his Sixth Amendment right to counsel. This approach is consistent with that taken in the vast majority of circuits and states which have addressed the issue. Furthermore, it is consistent with this Court's holding that there is no *per se* constitutional prohibition of joint representation.

That several jurisdictions require trial judges to inquire and to make inquiry of and advise defendants of their "right" to separate counsel and the potential problems created by joint representation is not controlling in this case. The inquiry requirement, even if adopted by this Court, is not constitutionally mandated and is therefore not relevant to this 1967 state trial. In addition, such a requirement only shifts the burden of proof to the state to show that a conflict did not exist. Thus, even if the inquiry requirement were applied to this case, Sullivan would not be entitled to relief because it was established below that no conflict existed.

II. A defendant seeking federal habeas relief must establish that his constitutional rights were violated by state

action. When a defendant is represented by counsel burdened with an actual conflict of interest, a fundamentally unfair trial results and the state action requirement is met. Similarly, if a Sixth Amendment infringement is so apparent that it should have been noticed by the trial court or prosecutor, state action has occurred. No such constitutional violation was even alleged to have occurred below. Neither the trial court nor the prosecutor was on notice of any possibility of conflict. Thus, the speculative conflict alleged was not the result of any action imputable to the state, but rather was created by Sullivan's decision to privately retain the same attorneys who represented his co-defendants. The Third Circuit erred in granting extraordinary relief absent any underlying state action.

III. Even if the Third Circuit's conflict standard is appropriate, the court erred in making its own findings of elemental fact from the record of a state court hearing and that improper finding was critical to the court's decision. The Third Circuit credited and accorded dispositive weight to backup counsel's testimony that he compromised Sullivan's interests at trial in favor of the co-defendants awaiting trial. The court below was bound to review the record consistently with the state court's denial of relief. Consequently, the Third Circuit's ruling could have properly held that backup counsel's testimony was disbelieved by the state hearing court, or that this particular credibility question was not explicitly resolved because it was irrelevant to the state court decision. If not resolved, the Third Circuit was required to remand the case to the district court for an evidentiary hearing. The Third Circuit, however, was not empowered to make *de novo* findings of fact and credibility. Such action was especially unwarranted where the accuracy of the testimony was seriously disputed. Thus, should this Court approve the legal standard followed by the Third Circuit, the case must be remanded for an evidentiary hearing and independent findings by the district court.

ARGUMENT I

THE THIRD CIRCUIT IMPROPERLY VACATED RESPONDENT'S PENNSYLVANIA MURDER AND CONSPIRACY CONVICTIONS UPON ITS FINDING THAT THERE WAS A POSSIBILITY OF CONFLICT OF INTEREST, HOWEVER REMOTE, RESULTING FROM THE JOINT REPRESENTATION OF RESPONDENT AND HIS TWO CO-DEFENDANTS BY THE SAME TWO ATTORNEYS.

A. The Third Circuit granted the writ based upon the possibility that a conflict existed, despite the fact that no actual conflict was shown to exist.

In 1966, respondent John Sullivan and two co-defendants, Gregory Carchidi and Anthony DiPasquale, were charged with murder and criminal conspiracy for the execution-style killings of two people inside a Teamster's Local union hall in Philadelphia. The three defendants, who were each tried separately, were represented by two prominent members of the Philadelphia bar, A. Charles Peruto and G. Fred DiBona. The attorneys were privately retained.[11] Sullivan was tried first and convicted of two counts of first degree murder and criminal conspiracy. The remaining defendants were subsequently separately tried and acquitted.

Since the date of his convictions, Sullivan's case has twice been litigated before the state's highest court. On the second of those instances, the Pennsylvania Supreme Court, after reviewing five days of testimony occasioned by

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11. The exact nature of the retainer, as well as the manner in which Sullivan and his co-defendants happened to retain the same counsel, remains unclear. These matters were not fully developed at the state court hearing; apparently, the funds were raised, at least in part, by friends of the defendants (Pet. App. 10B; 593 F.2d at 518, n.8).

the filing of a petition for collateral relief, rejected Sullivan's claim that he was deprived of his Sixth Amendment right to effective assistance of counsel because of a conflict of interest.

The witnesses who testified at the state court hearing included both counsel, the state trial judge, the Honorable Alexander F. Barbieri, and the prosecutor, Richard A. Sprague. Mr. (now Judge) DiBona, who served as Sullivan's chief counsel, testified that he perceived no conflict of interest among the three defenses of each of his clients, that there were no good defense witnesses available, and that his representation of Sullivan was not compromised in any way by joint representation. However, co-counsel Peruto noted that in deciding whether to put on defense witnesses at Sullivan's trial, one factor which he considered was the advantage to the remaining defendants if defense witnesses were not exposed at Sullivan's trial. Peruto, in retrospect, feared that he was "over-solicitous for the

other two defendants being ready to be tried."[12] The Pennsylvania Supreme Court, in reviewing this testimony,

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12. The critical testimony upon which years of litigation now hinge is as follows:

[BY PERUTO:]

A. Yes. I can recall the great discussions that we had with Sullivan where we were so convinced that—and we communicated this to Sullivan—

THE COURT: When you say great discussions, you mean lengthy discussion?

THE WITNESS: Lengthy discussion, yes, sir. Where we felt that he couldn't possibly be convicted and, therefore, what's the sense in exposing the defense because we had two more defendants to try.

BY [DEFENSE COUNSEL AT POST-CONVICTION HEARING ACT HEARING]:

Q. Wait—

A. And I'm afraid Sullivan suffered by that fact.

Q. Wait just a minute, sir. You were concerned with the other two defendants you represented; is that correct?

A. Yes. Why expose your defense if you've got two more people to come to trial and the Commonwealth has not presented a case?

Q. So that entered into your consideration as to whether or not you presented a defense in the Sullivan case?

A. Sure, it did. When we're talking about back and forth. For example, I've heard Judge DiBona testify today, and, yes, we were sort of playing devil's advocate. I didn't want the defense to go on because I thought we would only be exposing the defendant [sic] witnesses for the other two trials that were coming up. Now on the other hand, you see, the three defendants had already decided between themselves which of us they wanted to be chief counsel. John Sullivan picked Fred DiBona, the other two defendants picked me. So certainly I had to be chief counsel and face the trial of the other two men. And as I look back on that, although it was not my thought that John Sullivan should be short-changed in any fashion, I'm afraid that it was my thought that I was over-solicitous for the other two defendants being ready to be tried (A. 56a-58a).

found the division of responsibility, with regard to the representation of all three defendants, critical to its holding that there was no dual representation "in the true sense of the term."[13]

Sullivan subsequently sought federal habeas corpus relief, alleging, *inter alia*, the denial of his Sixth Amendment right to the effective assistance of counsel. This claim was rejected by the district court which, after independently examining the state court record, accepted the Pennsylvania Supreme Court's conclusion that there was no dual representation (Pet. App. 4C-8C).

The Third Circuit thereafter reversed the district court, and the two state court decisions, and granted the petition for a writ of habeas corpus upon concluding that the representation of the three defendants by two privately retained counsel violated Sullivan's Sixth Amendment right to effective assistance of counsel.

In reviewing the record for Sixth Amendment purposes, the Third Circuit applied the following standard:

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13. In relevant part, the Pennsylvania Supreme Court stated: [T]he testimony establishes that there was no dual representation in the true sense of the term, i.e., the same counsel actively represented co-defendants. Mr. Peruto testified that it was Mr. (now Judge) DiBona who served as chief counsel for appellant during trial and made all decisions relevant to Sullivan's defense while he, Peruto, was merely assisting. These functions were reversed at the trial of the co-defendants where Mr. Peruto was chief counsel and Judge DiBona the assistant. Thus, Judge DiBona served only a minor role in the trial of the co-defendants while devoting his primary efforts to the Sullivan case. This conclusion is supported by Judge DiBona's statements that his stewardship was in no way affected by the consideration of the co-defendant's cases but was solely a product of what he considered to be the best course in his representation of Sullivan. We therefore hold that there is absolutely no evidence that a conflict existed.

(Pet. App. 33D-34D; 472 Pa. at 161-162, 371 A.2d at 483) (emphasis added).

> [R]epresentation of co-defendants by the same attorney is not tantamount to the denial of effective assistance of counsel guaranteed by the sixth amendment. There must be some showing of a possible conflict of interest or prejudice, however remote, before a reviewing court will find the dual representation constitutionally defective. [Quoting *Walker v. United States*, 422 F.2d 374, 375 (3d Cir.) (per curiam), *cert. denied*, 399 U.S. 915 (1970).]
>
> . . . [A]ctual prejudice or conflict of interest need not be shown. The mere possibility, however remote, is sufficient.

(Pet. App. 12B-13B; 593 F.2d at 519-520) (footnote omitted).

This standard is not consistent with basic principles of habeas review and impermissibly intrudes on the state court judgment. A state prisoner seeking habeas relief, who first raises his conflict of interest claim *post-trial*, should bear an extraordinarily heavy burden in order to establish the validity of his claim.[14] However, as this case amply demonstrates, the Third Circuit has effectively created a

14. This Court has expressly indicated that federal habeas review of state convictions is reserved for only the very gravest allegations and that state prisoners are entitled to federal habeas relief only *upon proof* that their detention violates the Federal Constitution. *Townsend v. Sain*, 372 U.S. 293, 312 (1963).

constitutional presumption that joint representation in criminal cases is improper.[15]

The Third Circuit, in rejecting the decisions of both the Pennsylvania Supreme Court and the district court, found that there were sufficient indices of participation by Peruto to warrant a conclusion of joint representation (Pet. App. 12B; 593 F.2d at 519). Under the circuit's standard of review, little more than that need be shown to obtain relief.[16] Thus, once Peruto speculated, in retrospect, that he *may* have considered the interest of the co-defendants during Sullivan's trial, "the possibility of a conflict, however remote," standard was virtually met. According to the Third Circuit, the Peruto testimony mandated the conclusion that his influence on the decisions not to present defense witnesses, not to have Sullivan testify, and not to call co-defendant Carchidi were all tainted by a possible

15. The Third Circuit's standard of review may realistically eliminate joint representation in the Circuit. Certainly, any state court which allows such representation proceeds at great risk. *See Holloway v. Arkansas*, 435 U.S. 475, 491 (1978) (dissenting opinion of Powell, J.).

Moreover, although *Walker v. United States*, 422 F.2d 374, initially articulated the "possibility of conflict, however remote," standard in 1970, the full effect of its application to individual cases was not immediately apparent. No prior decision by or within the Third Circuit involved facts sufficiently similar to those presented in this case so that it could have been anticipated how broadly the rule could or would be applied. Further, one district court within the Third Circuit's jurisdiction commented in 1976 that "the Third Circuit standard . . . can be charitably characterized as difficult to apply . . ." *United States ex rel. Morgan v. Keve*, 425 F.Supp. 585, 588 (D. Del. 1976).

16. The divergent approaches to the conflicts problem, which have been adopted by other circuits and states, are set forth as an addendum at the conclusion of the brief. The Third Circuit standard of review for state conflict cases reflects one of the most stringent interpretations of the Sixth Amendment right to counsel and, therefore, places a relatively minimal burden on the habeas petitioner to establish a violation of that right.

conflict of interest, however remote. As a consequence, issuance of the writ was compulsory.[17]

The central problem with the Third Circuit's analysis and Sullivan's conflict claim is that no real alternatives were shown to exist which counsel actually overlooked. Sullivan has never made a claim, nor can he, that his case was not properly investigated or prepared because of an alleged conflict. Rather, the conflict is alleged to have materialized at the close of the state's case and concerned the question of whether a defense should be presented.[18] The Third Circuit noted that, had independent counsel decided not to present any defense, the court would have had little doubt that this would have been a sound tactical decision (Pet. App. 15B; 593 F.2d at 521). Further, that court ignored the fact that no defense evidence which would have had any bearing on guilt was ever shown to exist which could have been presented at Sullivan's trial. Indeed, at the state hearing on this issue, with the exception of the testimony which co-defendant Carchidi claimed he would have given at Sullivan's trial, there is nothing of record to indicate what defense witnesses could have been

17. The Third Circuit stated, in relevant part:

> Our examination of the record convinces us that there is in this case *at least a possibility of prejudice or conflict of interest and that independent counsel might well have chosen a different trial strategy*. Therefore, prior decisions of this court compel reversal.

(Pet. App. 15B; 593 F.2d at 521) (*emphasis added*).

18. For purposes of this argument, the veracity of the relevant portions of Mr. Peruto's testimony as to this point will be assumed; the question of the validity of that "finding of fact" is reserved for Argument III, *infra* at 42-46.

called, what they would have said, or whether they were available to testify either in 1967 or now.[19]

It is significant that the Third Circuit did not specifically credit Carchidi's 1974 testimony that he would have testified at Sullivan's trial if he had been called. Rather, since Carchidi was then under indictment and awaiting trial for the same crimes,[20] the court concluded that joint counsel were under conflicting duties: Sullivan needed to call Carchidi but counsel would not allow Carchidi to testify.[21] This alleged conflict is illusory. No defense attorney would have allowed Carchidi to testify at Sullivan's trial. Carchidi could not have risked testifying with murder charges pending against him. Thus, Carchidi simply was not an available witness at the time of Sullivan's trial, and the claim that he should have been called as a witness for Sullivan ignores reality. Conflict cannot be predicated on a claim that counsel did not engage in a futile exercise. *See, e.g., United States v. Martorano,* 457

19. In the statement of the case, we have described the allegedly available evidence that Sullivan theorized might have been presented in his defense. The Third Circuit mentioned only Carchidi and three witnesses who were outside the union hall. As to the latter three, Peruto indicated his reluctance to call them because they might have seen one of the co-defendants leaving the union hall (Pet. App. 16B; 593 F.2d at 521). However, no one, including Peruto, indicated how these witnesses, who were not called at the state court hearing, could have helped Sullivan.

20. Carchidi had previously invoked the Fifth Amendment at the Coroner's Inquest (A. 204a-205a) and testified that the only people with whom he had discussed the case were his two attorneys (A. 199a-200a).

21. The Third Circuit noted that, during Sullivan's trial, Peruto, in another context (regarding the admissibility of an out-of-court declaration by Carchidi), argued that Carchidi could not be called as a witness (Pet. App. 18B-19B; 593 F.2d at 522-523).

F.Supp. 803, 808-809 (D. Mass. 1978), which rejected a similar claim.[22]

Moreover, a close scrutiny of Carchidi's hearing testimony indicates that he would not have been a helpful witness for Sullivan since he would have effectively placed Sullivan in the building at the time of the killing (A. 195a-196a), and Carchidi barely, if at all, discredited McGrath. Thus, no witnesses existed who would have actually helped Sullivan; this is precisely what Judge DiBona indicated in the course of his testimony (A. 21a-22a).

Next, there is the question of Sullivan's decision not to testify. A careful reading of Peruto's testimony makes it clear that neither he nor DiBona had any conceivable conflict in advising Sullivan on this strategical question. Peruto could not even remember which position he advocated, although DiBona recalled that he (DiBona) wanted Sullivan to testify and Peruto played the "devil's advocate." Peruto never indicated, nor is there any basis from which to conclude, that Sullivan's decision not to testify had any connection, however remote, with Peruto's alleged concern for the co-defendants. In relevant part, Peruto testified as follows:

> A. *And you know, I'm not even sure now which of the two of us was pushing for him to testify or was pushing the other way.* I'm even mixed up on that. But I do recall that Fred DiBona felt that there was not enough

22. There, the court noted:

> [I]f separate attorneys had represented [appellant] and [co-defendant], then there would have been no way that [appellant] could have required [co-defendant] to relinquish his Fifth Amendment right to stay off the witness stand. Therefore, [appellant] could not possibly have been prejudiced by joint representation as far as [his co-defendant's] testimony is concerned, because he would not have been able to demand and obtain such testimony even had he been represented by a separate lawyer.

United States v. Martorano, 457 F.Supp. at 808-809.

> for it to go to the jury in the first place to result in a conviction. . . .
>
> Q. Well, Judge DiBona said that he urged the defendant to take the witness stand.
>
> A. Well, if that's his recollection, I'll have to say I can't refute it in my recollection.
>
> Q. Well, I want to know if it was you who urged him not to testify. . . .
>
> The Witness: Since I don't recall, I'll put it this way: Which of the two of us urged him to testify or did not, or whether I did it as a result of being sort of a devil's advocate—I represent him regularly, Judge—I would say that I would accept Judge DiBona's recollection. *And it does seem to my recollection more in keeping with what I would have done because of the other two defendants yet to testify.*

(A. 59a-60a) (emphasis added).[23]

Thus, it is clear from the record that there was no actual conflict of interest. Peruto's claim is little more than a hindsight belief that another strategy might have worked better.[24] DiBona perceived no conflict of interests problem and Peruto's vague claim of conflict simply does not bear up under close examination. Nevertheless, the Third Cir-

23. Sullivan denied that he made the ultimate decision not to testify (A. 138a). Sullivan's own testimony is largely inconsistent with several of the points made in the testimony of Peruto and DiBona. The state evidentiary hearing court found that Sullivan himself decided not to testify after consulting with counsel (Pet. App. 7F), and therefore credited the DiBona-Peruto version of the events.

24. Hindsight strategical laments hardly equate to constitutional violations. *United States v. Foster*, 469 F.2d 1, 4 (1st Cir. 1972).

cuit refused to examine the record to see if an actual conflict existed, stating:

> The contention that there were no witnesses whose testimony would have been useful requires us to speculate as to what witnesses who have never testified, some of whom are now deceased, would have said and whether independent counsel would have used their testimony. This we cannot do.

(Pet. App. 20B; 593 F.2d at 523).[25] Accordingly, the flaw in the "possibility of conflict, however remote" test thus becomes abundantly clear: the remoteness aspect mandates Sixth Amendment relief being granted on the hypothetical basis that an independent attorney might have presented defense witnesses although, as a matter of fact, none existed.

B. This Court's prior decisions, as well as the weight of other available authority compel the use of an "actual conflict" test when a conflict of interest is first raised post-trial.

In reviewing the viability of the standard of review adopted by the Third Circuit, three prior decisions by this Court are unquestionably relevant: *Holloway v. Arkansas*, 435 U.S. 475 (1978), *Dukes v. Warden*, 406 U.S. 250 (1972), and *Glasser v. United States*, 315 U.S. 60 (1942). *Glasser* was a joint representation case where, as trial commenced, the trial court, *over objection*, appointed Glasser's retained counsel to represent a co-defendant as well. There, a Sixth Amendment violation was found because the trial court, *over objection*, ordered joint representation of defendants with conflicting interests. In *Holloway*, the trial court, although repeatedly advised by

25. Interestingly, there is no record proof of any witnesses being deceased (*see Argument* III, *infra* at 45, n. 50).

defense counsel of the disparate interests of the three defendants for whom he was appointed, nevertheless and again *over objection* ordered counsel to represent them at a joint trial. There, this Court held that requests for appointment or retention of separate counsel prior to trial because of possible conflicts must be granted subject only to the trial court's power to explore "the adequacy of the basis of defense counsel's representation's regarding a conflict of interests without improperly requiring disclosure of the confidential communications of the client." *Holloway*, 435 U.S. at 487 (footnote omitted).[26]

Thus, where a *pre-trial* request is made for the appointment of separate counsel and is *improperly* denied, this Court has held that reversal is virtually automatic ("We read . . . *Glasser* . . . as holding that whenever a trial court improperly requires joint representation over timely objection reversal is automatic," *Holloway*, 435 U.S. at 488). This Court also held that a harmless error analysis could not be considered in these circumstances.

In *Dukes*, 406 U.S. 250, this Court had occasion to review the decision of the Connecticut Supreme Court denying Dukes' request for state habeas relief. Although this Court's opinion did not extensively address the conflict of interest issue,[27] the Court did affirm the Connecticut Supreme Court's holding that, because no actual conflict existed which motivated the guilty plea, Dukes was not entitled to relief. Since *Dukes*, unlike *Glasser* and *Hollo-*

26. The Court did note that, since *Glasser* was decided, courts have taken diverse approaches in joint representation cases where counsel does not advise the trial court of potential or actual conflict. Those questions, however, were not reached. 435 U.S. at 484.

27. Dukes was seeking to overturn his guilty plea based on the alleged conflict. This was raised for the first time after he had previously lost on direct appeal and federal habeas corpus on other theories. 406 U.S. at 250-251. The focus of this Court's opinion is more on the guilty plea than the conflict issue.

way, was a collateral review case, it does appear, at least inferentially from *Dukes*, that for collateral review cases, this Court has approved a state requirement that the defendant show actual conflict.

In any event, the instant case is factually distinct from *Glasser* and *Holloway*. In the case *sub judice*, no objection to the form of representation was raised prior to trial, and the challenged representation involved was made by privately retained counsel and not court-appointed counsel. In addition, all defendants received *separate* trials, and no factual basis is apparent from the record to conclude that the trial court should or could have been aware of any possibility of conflicting interests either before or during Sullivan's trial.

Despite these countervailing factors, the Third Circuit applied a standard for collateral attack that is barely distinguishable from the prophylactic approach used when the issue is raised pre-trial. Given that the one principle which emerges clearly from *Glasser* is that joint representation is not *per se* unconstitutional under the Sixth Amendment, the Third Circuit approach cannot be appropriate. There is presently no Sixth Amendment right to separate counsel, nor is there a recognized presumption that joint representation is improper *in all circumstances*.[28] Indeed, even in the *Holloway* situation, this Court allowed trial courts the latitude to inquire, pre-trial, into the *adequacy of the basis for a claimed conflict* before the court decides to honor a request for separate counsel. *Holloway*, 435 U.S. at 487.

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28. Several distinct advantages may exist in joint representation. The united front approach can insulate the defendants from being set against each other and also prevent the prosecutor from negotiating for testimony. Indeed, in some instances, the government may seek to prevent one attorney from representing multiple defendants. *Pirillo v. Takiff*, 462 Pa. 511, 341 A.2d 896 (1975), *cert. denied*, 423 U.S. 1083 (1976).

Given the prerequisite that some basis for the conflict be established in the pre-trial setting, it must be concluded that where, as here, the conflict is first claimed *post-verdict*, a defendant must show substantially more than a "possibility, however remote," that a conflict existed before a Sixth Amendment violation can be found.[29]

Should this Court accept this contention that the Third Circuit standard of review is neither constitutionally mandated nor justified, the problem remains of determining what standard of review should be employed to resolve post-verdict claims of improper joint representation on the basis of conflict of interests.[30] As the Court noted in *Hollo-*

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29. It is frequently noted that it is difficult to assess the precise degree of prejudice actually suffered in a conflict situation. *Glasser v. United States*, 315 U.S. at 75-76. This is often a point advanced in favor of granting relief liberally in conflict cases. However, where the objection is first made on collateral review, the vagaries of conflict also operate in favor of a defendant. Imagined conflicts can be easily conjured up and the motive to do so is obvious. Mr. Justice Frankfurter discussed this problem in his dissent in *Glasser*:

> It is a commonplace in the administration of criminal justice that the actualities of a long trial are too often given a meretricious appearance on appeal; the perspective of the living trial is lost in the search for error in a dead record. . . . Not until twenty weeks after Stewart had become counsel for the co-defendant Kretske, and fifteen weeks after the trial had ended, did Glasser discover that he had been deprived of his constitutional rights. This was obviously a lawyer's afterthought. It does not promote respect for the Bill of Rights to turn such an afterthought into an imaginary injury that is reflected nowhere in the contemporaneous record of the trial and make it the basis for reversal.

315 U.S. at 88-89.

30. Should the Court adopt the Third Circuit standard, the petitioner would still seek a remand for further proceedings. *See* Argument III, *infra*. There is, however, no argument being advanced that the Third Circuit misapplied its own legal standard to the facts as it found them.

way, courts have differed in their approach to the problem. Not only are differing standards employed by different courts, but the presence or absence of several factors may or may not alter their analysis: *e.g.*, the type of joint representation;[31] the status of counsel as appointed or privately retained; whether the trial court has an affirmative duty to inquire pre-trial regarding possible conflicts; whether the court did so inquire; whether the defendant was warned of the "right" to separate counsel and whether he waived it; and whether the court should have been on notice of a conflict, even if there was no duty to inquire and no objection raised.

This Court need not necessarily resolve all joint representation questions or devise a single standard to cover all conceivable situations to decide this case. It is submitted, however, that, *at the least*, in state joint representation cases, where defendants are tried separately, where counsel is privately retained and does not alert the court to any potential conflicts, either pre-trial or at trial, and where no potential conflicts are apparent from the trial record, *a heavy burden should be placed on defendants before relief is granted post-trial.*

Specifically, a convicted defendant should be required to show that an actual or real conflict of interest existed; that is, a conflict which actually prevented counsel from

31. The decisions do not even agree on the precise definition of joint representation. As previously indicated, a definitional distinction was drawn between jointly and separately tried defendants by the Third Circuit judges who voted for reargument *en banc* (Pet. App. 3A-4A; 593 F.2d at 525).

competently representing his clients' interests.[32] This standard is justified for several reasons: the convicted defendant has obvious reasons to fabricate conflicts in order to avoid criminal sanctions; the failure of counsel to avoid the conflict pre-trial, in accordance with his professional obligation,[33] is *prima facie* evidence that no *real* conflict of interest existed; the attorney post-verdict may not have lost his adversarial interest in his client and vague claims of potential conflict will suddenly surface. *See, e.g., Loukas v. Johnson,* 453 F.2d 407 (6th Cir. 1972); *Commonwealth v. Napper,* 254 Pa. Super. Ct. 54, 385 A.2d 521 (1978). Additionally, in this case, the potential for inherent, but not articulable, prejudice is far less because the defendant was tried separately and was repre-

32. All commentators have noted the degree of confusion and the definitional problems which have been created as lower courts have struggled with conflict questions *See generally* Tague, *Multiple Representation and Conflicts of Interest in Criminal Cases,* 67 Geo. L.J. 1075 (1979); Lowenthal, *Joint Representation in Criminal Cases: A Critical Appraisal,* 64 Va.L.Rev. 939 (1978); Geer, *Representation of Multiple Criminal Defendants: Conflicts of Interest and the Professional Responsibilities of the Defense Attorney,* 62 Minn.L.Rev. 119 (1978); Wanat, *Conflicts of Interest in Criminal Cases and the Right to Effective Assistance of Counsel —The Need for Change,* 10 Rut.-Cam. L.J. 57 (1978); Comment, *Conflicts of Interests in Multiple Representation of Criminal Co-Defendants,* 68 J. Crim. L.&C. 226 (1978); Hyman, *Joint Representation of Multiple Defendants in a Criminal Trial: The Court's Headache,* 5 Hofstra L.Rev. 315 (1977); Note, *Ensuring Effective Assistance of Counsel for the Criminal Co-Defendant,* 37 La.L.Rev. 1289 (1977). This brief does not advocate a separate showing of prejudice once a conflict is shown to exist. However, given that an actual or real conflict standard is advocated in this case, this distinction may be only semantic. Additionally, because the state's case was circumstantial, a harmless error argument is not presented in this case. However, there is no reason for harmless error to be generally rejected, as it was in *Holloway*. in cases where the defendant does not object to joint representation pre-trial.

33. ABA Code of Professional Responsibility DR 5-105.

sented by retained counsel of his own choice. Under such circumstances, establishing an actual or real conflict of interests is not so inherently difficult as to unreasonably preclude avenues for relief.

The standard advocated herein is not novel. Several circuits also require that, in joint representation cases, a *real* conflict of interests be shown.[34] *See, e.g., United States v. Foster*, 469 F.2d 1 (1st Cir. 1972) (defendant did not show any prejudice from joint representation); *Kaplan v. Bombard*, 573 F.2d 708 (2d Cir. 1978) (defendant must show some specific instance of prejudice, some real conflict of interest); *United States v. Carrigan*, 543 F.2d 1053 (2d Cir. 1976) (real conflict of interest and prejudice present since each defendant gave different version of incident to police and defendant's trial testimony was in conflict with co-defendant's statement, which was also admitted at trial); *United States v. Atkinson*, 565 F.2d 1283 (4th Cir. 1977), *cert. denied*, 436 U.S. 944 (1978) (defendant must show some specific instance of prejudice and some real

34. Some of these jurisdictions may, in varying degrees, shift the burden of proof to the state, if there was no pre-trial "inquiry" into the conflicts question. The applicability of the "inquiry" requirement will be discussed separately. However, the *dissent* in *Holloway* is noteworthy at this point because of the conflict standard suggested there. In that dissent, it was agreed that a pre-trial request for separate representation should trigger an inquiry by the trial judge. The dissenters, however, would not have applied prophylactic relief in the absence of an inquiry after a request for separate counsel. Rather, if a timely request for separate counsel was denied without a hearing, the burden would shift to the government "to establish the improbability of prejudice," 435 U.S. at 495-496, but "the record must offer some basis for a reasonable inference that 'conflicting interests' hampered a potentially effective defense." 435 U.S. at 496. This standard is not dissimilar from that advocated in this pre-trial "silent record" case where there is neither a request for separate counsel nor an inquiry.

conflict of interest); *Haggard v. Alabama*, 550 F.2d 1019 (5th Cir. 1977) (defendant must show actual prejudice); *Foxworth v. Wainwright*, 516 F.2d 1072 (5th Cir. 1975) (actual prejudice exists as to minimally involved defendant since plausible defense of shifting blame to co-defendants foreclosed by joint representation); *Thacker v. Bordenkircher*, 590 F.2d 640 (6th Cir.), *cert. denied*, 99 S. Ct. 2827 (1979) (defendant must show that there was a conflict of interest and that he was prejudiced thereby; the establishment of mere potential conflict arising from joint representation is not sufficient to constitute violation of the Sixth Amendment); *United States v. Woods*, 544 F.2d 242 (6th Cir. 1976), *cert. denied*, 430 U.S. 969 (1977) (defendant must show actual prejudice); *United States ex rel. McClindon v. Warden*, 575 F.2d 108 (7th Cir.), *cert. denied*, 439 U.S. 856 (1978) (defendant must show that a conflict of interest existed in fact); *United States v. Mandell*, 525 F.2d 671 (7th Cir. 1975), *cert. denied*, 423 U.S. 1049 (1976) (defendant must show with a reasonable degree of specificity that a conflict of interest actually existed at trial); *Davidson v. Cupp*, 446 F.2d 642 (9th Cir. 1971) (defendant must show specific prejudice in order to prevail); *Watkins v. Wilson*, 408 F.2d 351 (9th Cir. 1969) (defendant must demonstrate that some specific prejudice resulted from the joint representation); *Fryar v. United States*, 404 F.2d 1071 (10th Cir. 1968), *cert. denied*, 395 U.S. 964 (1969) (defendant must show that prejudice resulted from the joint representation).

The Eighth Circuit Court of Appeals requires a showing of actual prejudice or a *substantial possibility* of a conflict of interest. *Austin v. Erickson*, 477 F.2d 620 (8th Cir. 1973); *Beran v. United States*, 580 F.2d 324 (8th Cir. 1978), *cert. denied*, 99 S. Ct. 1422 (1979) (defendant must show that there was an actual conflict of interest or a substantial possibility of such a conflict).

C. The presence or absence of a pre-trial judicial inquiry is not constitutionally significant in this case.

The delineation of the proper standard to be employed is complicated by the subsidiary question of the need for a pre-trial judicial inquiry. Many courts now find significant, in any post-verdict review of a Sixth Amendment challenge, the absence or presence of a thorough pre-trial inquiry, by the trial court, into potential conflicts of interest. The presence of such an inquiry may signify a waiver by defendant of the Sixth Amendment claim. In most jurisdictions where inquiry is required, its presence or absence will determine where the burden of proof will lie—with the defendant or the government—if there is a post-verdict challenge. *See generally United States v. Lawriw*, 568 F.2d 98 (8th Cir. 1977), *cert. denied*, 435 U.S. 969 (1978).

Proposed Fed. R. Crim. P. 44(c), now being considered by Congress,[35] would require trial courts to make pre-trial

35. Proposed Rule 44(c) reads as follows:

Rule 44. Right to and Assignment of Counsel

. . .

(c) JOINT REPRESENTATION. Whenever two or more defendants have been jointly charged pursuant to Rule 8(b) or have been joined for trial pursuant to Rule 13, and are represented by the same retained or assigned counsel or by retained or assigned counsel who are associated in the practice of law, the court shall promptly inquire with respect to such joint representation and shall personally advise each defendant of his right to the effective assistance of counsel, including separate representation. Unless it appears that there is good cause to believe no conflict of interest is likely to arise, the court shall take such measures as may be appropriate to protect each defendant's right to counsel.

On April 30, 1979, this Court promulgated Rule 44(c) as an amendment to the Federal Rules of Criminal Procedure, effective August 1, 1979. The effective date was postponed (93 Stat. 326) until expressly approved or December 1, 1980, whichever is earlier. The Advisory Committee Comment to Rule 44(c) appears at 77 F.R.D. 507, 594-604 (1978).

inquiries, and to take corrective measures, unless there is little likelihood that a conflict problem would arise. 77 F.R.D. at 594.[36] The proposed rule reflects the conclusion reached by many courts that the most efficacious way to deal with the "conflict" problem is to avoid it pre-trial, either by securing the defendants' waiver of any Sixth Amendment claim, or by ordering that separate counsel enter the case. Although there are arguments which can be made to suggest that this approach may be less than a perfect solution to the problem, that discussion is not relevant herein.[37] Rather, the more immediate question is whether the failure to inquire, prior to a 1967 Pennsylvania

36. The American Bar Association Project on Standards For Criminal Justice has recently amended the Standards to provide that defendants must give informed consent to joint representation and that the consent must be made a matter of judicial record. ABA Standards Relating to the Administration of Criminal Justice — *The Defense Function*, Standard 4-3.5 (Conflict of Interest) (Approved Draft, February 12, 1979). The relevant standard, in effect when *Holloway* was decided (ABA Standards Relating to the Administration of Criminal Justice—*The Function of the Trial Judge*, §3.4(b), (Approved Draft 1972)), which required judicial inquiry into potential conflict, has been suspended. (*See* ABA Standards Relating to the Administration of Criminal Justice—*Special Functions of the Trial Judge*, Derivation Table (Approved Draft 1978)).

37. In fact, if applied prospectively, an inquiry rule will help to insulate convictions from collateral attack. Thus, from that viewpoint, the inquiry rule may be desirable. However, this does not make the inquiry requirement a matter of constitutional mandate.

state trial. is legally significant in a federal habeas corpus proceeding.[38]

An automatic inquiry requirement was certainly not in effect in Pennsylvania or the Third Circuit in 1967 when Sullivan was tried.[39] Further, it is submitted that, since the concept and legal philosophy embodied in Rule 44(c) should be deemed strictly supervisory and not of constitutional dimension, it should not apply to this 1967 case.[40]

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38. It may be argued that some inquiry is constitutionally necessary where a potential conflict becomes apparent to the trial judge (*see, e.g., United States v. Mandell*, 525 F.2d at 677) or where counsel is appointed by the court. Those issues are not present here as counsel was privately retained and no potential conflict was apparent prior to or during trial. Whether an inquiry requirement in *all* cases has constitutional underpinnings and is, therefore, applicable to state court proceedings has not been extensively discussed by the courts. *See LaFleur v. Hall*, 383 F.Supp. 1188, 1190, n.3 (D. Mass. 1974) (noting that court's supervisory rule requiring an inquiry is not binding on the state court); *Salomon v. LaVallee*, 575 F.2d 1051, 1055 (2d Cir. 1978) (where the court specifically reserved decision on whether the court's supervisory rule, requiring an inquiry by the trial court and the attendant shift in the burden of proof absent a satisfactory inquiry, would apply to a review of state court convictions). *But see Colon v. Fogg*, 603 F.2d 403 (2d Cir. 1979) (where the court, without discussion of the issue, reversed the district court's order and ruled that the state failed to meet its burden of disproving prejudice).

39. The possibility of conflict, however remote, standard was first adopted in the Circuit in 1970 (*Walker v. United States*, 422 F.2d at 375). In 1973, the Third Circuit discussed pre-trial inquiry and declined to adopt a *per se* rule requiring it, preferring instead to use the standard applied herein (*United States ex rel. Hart v. Davenport*, 478 F.2d 203, 210 (3d Cir. 1973)). Ironically, the authorities cited in support of the standard from other circuits do not indicate that those circuits use the "possibility, however remote," standard.

40. Even a Rule 44(c) violation would not carry with it the mandatory reversal requirement of Fed.R.Crim.P. 11. *See* 77 F.R.D. at 603. Moreover, this Court has recently held that a formal violation of Rule 11 is not cognizable on habeas corpus. *United States v. Timmreck*, 99 S.Ct. 2085 (1979).

The Sixth Amendment guarantees the right to the effective assistance of counsel; however, the additional conclusion that joint representation of defendants is presumptively violative of the constitutional right to effective counsel is simply unwarranted. As this Court recognized in *Glasser* and *Holloway*, joint representation is not *per se* violative of the Sixth Amendment right. Hence, there is no *per se* Sixth Amendment right to *separate* counsel. Thus, any requirement that the court inquire pre-trial and advise the defendant of the "right" to separate counsel should be supervisory and not of constitutional dimension.[41]

Thus, the Commonwealth submits that the Third Circuit standard should not be applied to the facts herein nor should any "inquiry" factor be significant. Rather, at the least, in a 1967 state trial, a defendant initially objecting to joint representation after conviction must establish the presence of an actual or real conflict of interest, as previously defined, before federal habeas corpus relief should be considered. Indeed, if this standard is adopted, the record herein would not be sufficient to justify giving Sullivan relief regardless of which side bears the burden of proof. The record establishes no conflict. Rather, at most, there is an attorney's and a defendant's lament that they lost and that, maybe, if they had another chance, they would win. This is simply not a basis for granting a writ of habeas corpus.

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41. As to this point, a comparison with *Boykin v. Alabama*, 395 U.S. 238 (1969), and guilty pleas is illustrative. There, the Court held that it would not presume a defendant's waiver of the important federal rights which are relinquished upon the entry of a guilty plea *from a silent record*. 395 U.S. at 243. However, as the Court made clear, to reach that holding and require an inquiry, there had to be an underlying constitutional right being relinquished. Thus, here, unless a Sixth Amendment right to separate counsel is found to exist, the inquiry requirement cannot be deemed to be a constitutional requirement.

ARGUMENT II

BECAUSE THE SIXTH AMENDMENT VIOLATION ALLEGED BELOW WAS NOT CAUSED OR FOSTERED BY STATE ACTION, THE THIRD CIRCUIT ERRONEOUSLY FOUND THAT VIOLATION TO BE AN APPROPRIATE GROUND FOR ISSUING THE WRIT OF HABEAS CORPUS.

A defendant seeking federal habeas corpus relief must demonstrate that an alleged constitutional violation was caused by the state.[42] Because the putative Sixth Amendment violation here was not even arguably an action of the state, the Third Circuit erroneously granted the writ.

Federal habeas review is extraordinary; it was not intended that the federal judiciary review all criminal convictions arising from the state courts.[43] A Sixth Amend-

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42. It is fundamental that the Constitution exists to protect individuals from actions of the state. *See generally* Farrand, 1 Records of the Federal Convention of 1787, 132 *et seq.* (1966). Consequently, this Court has held that no infringement of constitutional rights will generally be found absent state action which caused the violation. *See, e.g., Flagg Brothers, Inc. v. Brooks*, 436 U.S. 149, 155 (1978) ("[M]ost rights secured by the Constitution are protected only against infringements by governments.").

43. Habeas Corpus always has been a *collateral* remedy, providing an avenue for upsetting judgments that have become otherwise final. It is not designed as a substitute for direct review.

Williams v. United States, 401 U.S. 675, 682-683 (1971) (Harlan, J., concurring) (emphasis in original). This limited scope of habeas review conforms to well-settled principles of federalism by which the federal judiciary largely defers to the legislative and judicial determinations of the states. *Merrill Lynch, Pierce, Fenner & Smith, Inc. v. Ware*, 414 U.S. 117, 126-127 (1973); *Labine v. Vincent*, 401 U.S. 532, 537-539 (1971); *Powell v. Texas*, 392 U.S. 514, 535 (1968); *Duncan v. Louisiana*, 391 U.S. 145, 148-149 (1968); *Thacker v. Bordenkircher*, 590 F.2d 640, 641 (6th Cir.), *cert. denied*, 99 S.Ct. 2827 (1979).

ment claim alleging a conflict is meaningless unless it can also be shown that the state was in some way responsible for the infringement. When counsel is appointed to represent co-defendants, the state action is obvious; the state quite literally ordered the joint representation. If, however, counsel is retained by the defendant, state action is not automatically implicated, because the defendant himself, not the state, created the joint representation. Thus, the distinction between retained and appointed counsel does not arbitrarily curtail habeas review solely on the basis of a defendant's financial situation. *See United States ex rel. Hart v. Davenport*, 478 F.2d 203, 211 (3d Cir. 1973).[44] Of course, the mere fact that counsel is retained does not end the inquiry, as there are two additional possible predicates for federal habeas review. If the state court or state prosecutor precipitated the alleged

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44. The concept that the general effectiveness of retained and appointed counsel should be evaluated differently is well settled. *See United States v. Rodriquez Vallejo*, 496 F.2d 960 (1st Cir.), *cert. denied sub nom. Vallejo v. United States*, 419 U.S. 965 (1974); *United States v. Bubar*, 567 F.2d 192 (2d Cir.), *cert. denied*, 434 U.S. 872 (1977); *Root v. Cunningham*, 344 F.2d 1 (4th Cir.), *cert. denied*, 382 U.S. 866 (1965); *Lacaze v. United States*, 457 F.2d 1075 (5th Cir.), *cert. denied*, 409 U.S. 921 (1972); *Loukas v. Johnson*, 453 F.2d 407 (6th Cir. 1972); *Plaskett v. Page*, 439 F.2d 770 (10th Cir. 1971); *United States v. Riebold*, 557 F.2d 697 (10th Cir.), *cert. denied*, 434 U.S. 860 (1977); *Williams v. Estelle*, 416 F. Supp. 1073 (N.D. Tex. 1976); *Kallie v. Beto*, 353 F. Supp. 966 (S.D. Tex. 1973), *aff'd sub nom. Kallie v. Estelle*, 515 F.2d 588 (5th Cir.), *cert. denied*, 423 U.S. 1019 (1975); *Williams v. United States*, 304 F. Supp. 691 (E.D. Mo. 1969); *Shaw v. Henderson*, 303 F. Supp. 183 (E.D. La. 1969), *aff'd*, 430 F.2d 1116 (5th Cir. 1970); *Opie v. Meacham*, 293 F. Supp. 647 (D. Wyo. 1968), *aff'd*, 419 F.2d 465 (10th Cir. 1969), *cert. denied*, 399 U.S. 927 (1970). For state decisions, *see* Annot., 74 A.L.R. 2d 1384, 1406 §5. With respect to Sixth Amendment claims involving an allegation of a conflict of interest, a smaller number of courts draw this distinction. *See* Addenda I and I'

conflict, or did nothing to mitigate a conflict of which they should have been aware, the requisite state action has occurred for Sixth Amendment purposes. In addition, state action as well as a due process violation will be found if the defendant shows that the state proceedings were "fundamentally unfair" because his retained attorney was burdened by an *actual* conflict of interest.

This analysis has been followed by the Fifth Circuit for several years. *See, e.g., Fitzgerald v. Estelle*, 505 F.2d 1334, 1337 (5th Cir. 1974), *cert. denied*, 422 U.S. 1011 (1975); *Foxworth v. Wainwright*, [illegible] F.2d 1072 (5th Cir. 1975).[45] In adopting this standard, the Fifth Circuit has effectively and properly balanced the competing interests at work in the administration of criminal justice.

The Third Circuit has rejected the approach articulated by the Fifth Circuit in *Fitzgerald*. *United States ex rel. Hart v. Davenport*, 478 F.2d at 210. Although it purported to acknowledge the necessity of state action, the *Hart* court held that the state action requirement is automatically met whenever a conflict occurs during a criminal proceeding and no inquiry is made by the trial court or prosecutor.

The Third Circuit's approach, unlike that of the Fifth Circuit, ignores many of the interests central to the administration of justice as well as the fundamental differences

45. *See also United States v. Bosch*, 584 F.2d 1113, 1123 n.7 (1st Cir. 1978); *Garton v. Swenson*, 497 F.2d 1137, 1139 n.4 (8th Cir. 1974); *People v. Cook*, 13 Cal. 3d 663, 119 Cal. Rptr. 500, 532 P.2d 148, *cert. denied*, 423 U.S. 870 (1975); *People v. Gomberg*, 38 N.Y. 2d 307, 397 N.Y.S. 2d 769, 342 N.E. 2d 550 (1975); *State v. Jeffrey*, 162 Mont. 92, 515 P.2d 364 (1973).

between retained and appointed counsel.[46] For instance, a defendant who hires counsel can carefully search for an attorney whose abilities are especially suitable to the tasks at hand. An indigent has no choice; he must accept whomever is appointed, regardless of the lawyer's ability. More important, retained counsel can be fired if the client is at all dissatisfied with his performance. An indigent, however, must present compelling reasons before counsel will be replaced. *See United States v. Rodriguez Vallejo*, 496 F.2d 960 (1st Cir. 1970). Because an indigent defendant has not employed his attorney, and so may be unable to take steps that will ensure satisfactory performance, closer scrutiny of court appointed counsel is necessary. *Commonwealth v. Myers*, 472 Pa. 200, 209, 371 A.2d 1279, 1283 (1977); *Commonwealth v. Williams*, 457 Pa. 502, 508-509, 327 A.2d 15, 18 (1974). In addition, the *Fitzgerald* standard lends integrity to the truth-determining function central to any prosecution:

> Ordinarily, a defendant who retains counsel of his own selection is responsible if that counsel does not faithfully serve his interest. Any other rule would put a premium upon pretended incompetence of coun-

46. Significantly, in rejecting the *Fitzgerald* standard, the Third Circuit failed to realize that the Fifth Circuit test does not preclude the granting of habeas relief in appropriate conflict situations involving privately retained counsel. As has been shown, when a defendant demonstrated the existence of an *actual* conflict which should have been apparent to the judge or prosecutor, or which violated the concerns of due process and fundamental fairness, the extraordinary relief afforded through federal habeas intervention has been granted. *Zuck v. Alabama*, 588 F.2d 436 (5th Cir. 1979), *petition for cert. filed*, 47 U.S.L.W. 3829 (U.S. May 21, 1979) (No. 78-1741); *Messelt v. Alabama*, 595 F.2d 247 (5th Cir. 1979); *United States v. Alvarez*, 580 F.2d 1251 (5th Cir. 1978). However, in the instant case, involving a Sixth Amendment ineffectiveness claim based upon a highly speculative conflict, the *Fitzgerald* standard would preclude federal review.

> sel for, if the rule were otherwise, a lawyer with a desperate case would have only to neglect it in order to ensure reversal or vacation of the conviction. *People v. Mitchell*, 411 Ill. 407, 104 N.E.2d 285 (1952).

Loukas v. Johnson, 453 F.2d at 408.

Finally, the *Fitzgerald* standard provides federal habeas review for all claims of *actual* conflict of interest. Thus, the distinction used in retained counsel situations not only limits review to compelling conflict claims, but it also lends a degree of finality to criminal litigation.[47]

When applied to this case, the soundness of the *Fitzgerald* standard is apparent. At trial, there was not the slightest indication that the loyalty of Sullivan's attorneys were divided. On the contrary, the record shows quite plainly that these two men, described as "two of Philadelphia's best known trial attorneys," represented Sullivan with great skill and vigor (Pet. App. 3A; 593 F.2d at 525). Under these circumstances, it is clear that neither the trial judge nor the prosecutor acted irresponsibly in failing to inquire as to "the possibility of a conflict, however remote." This is particularly true because the defendants were tried separately. *See Miller v. United States*, 564 F.2d 103, 106 (1st Cir. 1977), *cert. denied*, 435 U.S. 931 (1978). Under these circumstances, it is clear that the Third Circuit erred in even considering the Sixth Amendment claims raised below.[48] The primary issue in habeas review

47. *See Durfee v. Duke*, 375 U.S. 106, 111 (1963) ("Public policy dictates that there be an end of litigation . . ."); *Church v. Hubbart*, 6 U.S. (2 Cranch) 187, 232 (1804) (per Marshall, C.J.) ("[I]t is desirable to terminate every cause upon its real merits . . . and put an end to litigation when it is within the power of the court to do so.").

48. Significantly, the decision below was based wholly upon a Sixth Amendment claim of speculative conflict; no due process or fundamental fairness claim was even discussed. Accordingly, the standard of review appropriate in cases where counsel was retained is properly applied here. *See Zuck v. Alabama*, 588 F.2d 436.

is the presence or absence of state action under the particular facts of the case. Viewed in this perspective, there is nothing unsound or unreasonable in drawing distinctions that might not otherwise be drawn. The Third Circuit failed to appreciate that state action, not the status of counsel, is the threshold inquiry for habeas corpus review.[49]

49. In his answer to the Commonwealth's petition for certiorari, Sullivan argued that the Commonwealth's state action argument, although discussed by Judge Garth below (Pet. App. 2A-3A; 593 F.2d at 524-525), had been waived because it was not included in the Commonwealth's brief to the Third Circuit. This Court has consistently reviewed similarly presented issues. *Rose v. Mitchell*, 99 S. Ct. 2993, 3009 (1979); *Procunier v. Navarette*, 434 U.S. 555 (1978); *Bellotti v. Baird*, 428 U.S. 132, 143 n.10 (1976); *Blonder Tongue Laboratories, Inc. v. University of Illinois Foundation*, 402 U.S. 313, 320 n.6 (1971); *Moragne v. State Marine Lines, Inc.*, 389 U.S. 375, 378 n.1 (1970); *Allen v. Board of Elections*, 393 U.S. 544, 554 (1969); *United States v. Speers*, 382 U.S. 266, 277 n.22 (1965); *Silber v. United States*, 370 U.S. 717 (1962). The general rationale underlying these decisions is: 1) the disputed issue was fairly encompassed by the claims discussed in the lower courts or was in fact discussed by one of the lower courts, and 2) the record allows for full evaluation of the issue. The state action argument conforms to both these requirements. It was discussed by Judge Garth below. In addition, it is fairly encompassed by all the opinions below, as any discussion of infringement of Sixth Amendment rights is predicated on underlying state action. Finally, the issue may be fully evaluated on the record before this Court. Thus, the issue has not been waived. Moreover, as the state action question is virtually tantamount to jurisdiction, it is an issue of exceptional importance which could properly be discussed by this Court even if not raised by the Commonwealth. *Youakim v. Miller*, 425 U.S. 231 (1976); *Duignan v. United States*, 274 U.S. 195 (1927).

ARGUMENT III

THE THIRD CIRCUIT TRANSGRESSED APPROPRIATE LIMITS OF APPELLATE REVIEW BY MAKING DE NOVO FINDINGS OF FACT AND CREDIBILITY BASED SOLELY UPON ITS ASSESSMENT OF THE RECORD OF THE STATE COURT HEARING.

Under settled principles of habeas corpus review, the Third Circuit was required to accept as presumptively correct the findings of fact made by the state court after a hearing on the merits of respondent Sullivan's conflict of interest claim. 28 U.S.C. §2254(d); *LaVallee v. Delle Rose*, 410 U.S. 690, 691-695 (1973); *Townsend v. Sain*, 372 U.S. 293, 314-315 (1963). If the Third Circuit determined that those findings were incomplete or inadequate for purposes of appellate review, the court should have remanded the case to the district court for a plenary evidentiary hearing at which a competent resolution of inconsistent testimony and of witness credibility could be made. *Townsend v. Sain*, 372 U.S. at 312-316. *See also United States ex rel. McNair v. New Jersey*, 492 F.2d 1307 (3d Cir. 1974). Contrary to these principles of comity, the Third Circuit made its own *de novo* findings of fact and credibility, based solely upon review of the written transcript of the state court hearing. As a result, the Third Circuit erroneously granted the writ, based not upon the proper application of legal principles to findings of fact made by a lower court, but upon that appellate court's own speculative findings of fact, and a determination that those "facts" gave rise to a possible conflict of interest on the part of counsel. Thus, even if this Court adopts the Third Circuit standard and holds that the Sixth Amendment guarantee will afford relief to a defendant who establishes the possibility of a conflict of interest on the part of counsel, the decision below must nevertheless be reversed.

The Third Circuit based its finding of a possible conflict of interest upon the equivocal testimony of A. Charles Peruto, who assisted lead counsel DiBona at Sullivan's trial. Peruto, who repeatedly admitted at the state court hearing that his recollection of specific discussions held eight years earlier was meager, testified that at Sullivan's trial he had advised against presenting a defense case for various reasons, including a concern for avoiding disclosure of witnesses prior to the trials of the two co-defendants. Rejecting the determinations of the district court and of the state courts that Sullivan was not entitled to relief, the Third Circuit *sua sponte* credited Peruto's assertions regarding his tactical suggestions and his motivation, and indeed accorded them dispositive weight, simply because "[n]o reason or evidence is offered to explain why an attorney would make [this] damaging admission of professional impropriety . . . were it not true" (Pet. App. 17B; 593 F.2d at 522).

The logic of the Third Circuit is fundamentally flawed by a misperception of the precise issue before the court, and by a misunderstanding of the proper limits of appellate review of state court adjudications.

Unquestionably, a federal appellate court reviewing the denial of habeas corpus relief has the power, and the duty, to independently assess the legal and constitutional significance of elemental facts as found by a state hearing court. *See, e.g., Neil v. Biggers*, 409 U.S. 188, 193 n.3 (1972). However, whether Peruto ever *in fact* advised against presenting a defense, and, if so, whether that advice was *in fact* motivated by a concern for the other two co-defendants, were just that—questions of basic and elemental fact, properly answerable only by a hearing court afforded the opportunity to observe the witness and to evaluate his ability to remember and his credibility. *Townsend v. Sain*, 372 U.S. at 309 n. 6; *Brown v. Allen*, 344 U.S. 443, 506 (1953) (opinion of Mr. Justice Frankfurter). The Third Circuit was required to review the findings of

the state court consonant with that court's denial of relief. *See, e.g., LaVallee v. Delle Rose,* 410 U.S. at 695. Upon such review, the Third Circuit could have found that the state court necessarily rejected Peruto's testimony, or that the state court made no explicit finding because, regardless of that testimony, Sullivan was not entitled to relief. If the Third Circuit determined that the state court's decision was not supported by the record, or that the state court, which applied an actual conflict standard, had failed to make specific or adequate findings of fact relevant to the different test applied by the federal court, the only proper recourse was to remand the case to the district court for an independent evidentiary hearing and findings of fact. *Townsend v. Sain,* 372 U.S. at 312-316.

Instead of following this appropriate course, the Third Circuit exceeded its legitimate authority by making its own determination that Peruto's testimony was worthy of belief and acceptance. Rejecting any consideration of the Commonwealth's argument that Judge DiBona's testimony, and other evidence of record, conclusively rebutted any possibility of conflict, the Third Circuit granted relief because "[w]e have no basis on which to reject Peruto's sworn admission that he injected improper considerations into the attorney-client relationship" (Pet. App. 17B; 593 F.2d at 522).

Apart from the inherent unreliability of such factual findings by an appellate court, the Third Circuit's logic in so crediting Peruto's testimony cannot withstand scrutiny. In presuming Peruto's veracity, the court not only relieved Sullivan of his burden of rebutting the presumptive regularity and legitimacy of his conviction, but also utterly ignored the possibility that Peruto's recollection of the trial was inaccurate, whether by intent or by mistake. The Third Circuit gave no consideration to the inherent bias defense counsel may retain after his client's conviction. The impact of that bias upon the attorney's ability to suddenly become an objective witness in a collateral attack

on that conviction can properly be evaluated only by the primary finder of fact at an evidentiary hearing. The Third Circuit failed to perceive that such bias could prompt an attorney, subliminally or not, to reconstruct the events of the past in order to obtain the originally desired goal of acquittal. *See, e.g., Loukas v. Johnson,* 453 F.2d 407 (6th Cir. 1978); *Commonwealth v. Napper,* 254 Pa. Super. Ct. 54, 385 A.2d 521 (1978). That possibility becomes far from problematic in light of Peruto's admitted personal disagreement with the jury's verdict. That he may have perceived the opportunity to testify at the hearing as a vehicle for righting a past "wrong" cannot be ignored. Moreover, the Third Circuit's *a fortiori* reasoning becomes even less acceptable upon review of the record that discloses the speculative nature of Peruto's testimony, his admittedly limited memory of the events eight years earlier, and the denial of the existence of conflicting interests by Judge DiBona, which was credited by the district court and the state courts.[50]

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50. The Third Circuit's further acceptance of the record testimony of Sullivan and of Carchidi, as corroborating Peruto, is equally questionable. Carchidi's willingness to testify, asserted after he was relieved of jeopardy, cannot logically be transposed into a finding that while awaiting trial on two counts of murder, with the possibility of a death penalty if convicted, he would have abandoned his Fifth Amendment rights. Nor can Sullivan's self-serving declarations be worth even the slight credit accorded them by the Third Circuit. *See* Argument I, *supra* at 19-24.

The impropriety of the assumption of *de novo* fact finding authority by the Third Circuit is further dramatized by the statement in the court's opinion that certain of the putative defense trial witnesses have since died (Pet. App. 20B; 593 F.2d at 523). As the commonwealth pointed out in its brief to that court, there is no record evidence whatever in support of that finding. The Third Circuit's conclusion could only have been based upon alleged death certificates, never stipulated to or entered into evidence, attached to Sullivan's brief filed in the Pennsylvania Supreme Court.

Even if as a matter of law a defendant is entitled to relief upon showing the possibility of a conflict of interest, he still bears the burden of establishing that such a possibility existed as a matter of fact by credible and probative evidence. Thus it is inconceivable that the court below would have granted the writ solely upon Sullivan's own claim that his attorneys deferred to the interests of his co-defendants. Nor would the court have accepted a legal argument, unadorned by direct evidence, that the possibility of conflict existed anytime multiple defendants were separately tried, since counsel would naturally desire to prevent discovery of all defense evidence at the first trial. Acceptance of either of those claims would be illogical and tantamount to *per se* prohibition of joint representation under any circumstances, a conclusion contrary to the clear decision of this Court in *Holloway v. Arkansas*, 435 U.S. 475 (1978).

The Commonwealth does not dispute the Third Circuit's responsibility to determine the existence of a possible conflict of interest as a matter of law under that court's interpretation of the constitutional standard of review. The Commonwealth, however, does seriously contest the Third Circuit's authority to make findings of fact necessary to support that legal determination solely upon the court's reading of the record. Thus, because the court below exceeded the legitimate bounds of appellate review, even if this Court accepts the legal standard formulated by the Third Circuit, the case must be remanded to the district court for an independent evidentiary hearing and for appropriate findings of fact.[51]

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51. Of course, should this Court reject the Third Circuit's standard but adopt a legal standard other than the actual conflict test advocated in Argument I, *supra*, and applied by the Pennsylvania courts, the case must be remanded to the district court for appropriate findings of fact.

CONCLUSION

The judgment of the court of appeals should be reversed.

Respectfully submitted,

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ADDENDUM

I. FEDERAL CASES

FIRST CIRCUIT

Standard

In joint representation cases, the defendant has the burden of establishing an actual conflict between his interests and those of his co-defendants. *United States v. Foster,* 469 F.2d 1 (1st Cir. 1972).

Duty to Inquire

In *United States v. Foster,* 469 F.2d 1 (1st Cir. 1972), the court announced a prospective rule, pursuant to its supervisory powers, that the district courts must inquire of jointly-represented defendants regarding the risks of joint representation. In *United States v. Donahue,* 560 F.2d 1039 (1st Cir. 1977), the court expanded the scope of the inquiry and ruled that the district courts must fully advise jointly represented defendants of the *specific dangers* which such representation could entail. The court later held that its ruling in *Donahue* was not constitutionally mandated but was a mere expansion of a supervisory rule. *United States v. Waldman,* 579 F.2d 649 (1st Cir. 1978).

Review of State Court Convictions

In a district court opinion, the court stated that the court's supervisory rule requiring an inquiry is not binding upon state courts. *LaFleur v. Hall,* 383 F.Supp. 1188, 1190 n.3 (D. Mass. 1974). Presumably, in such cases, the burden of proof would be on the defendant.

Burden of Proof

The First Circuit's articulation of burden of proof is, at best, confusing. In joint representation cases, where the district court has fulfilled its duty to inquire, the defendant has a "heavy burden" of persuasion. *United States v. Foster,* 469 F.2d at 5. *See United States v. DiCarlo,* 575 F.2d 952, 957 (1st Cir.), *cert. denied,* 439 U.S. 834 (1978). However, in cases where the court sought to distinguish the defendant's burden of proof in cases of joint representation, from the situation where defense counsel has a legal relationship with a hostile party or witness (which the court describes as "dual" representation), the court noted that, in joint representation cases, "only a relatively slight showing of actual prejudice is required." *United States v. DiCarlo,* 575 F.2d at 957; *Miller v. United States,* 564 F.2d 103, 106 (1st Cir. 1977), *cert. denied,* 435 U.S. 931 (1978). (Joint representation appears to refer to representation of two or more co-defendants at a single trial.) By contrast, in cases of dual representation, as defined by the court, the defendant must establish "a real conflict of interest or a specific instance of prejudice." *United States v. DiCarlo,* 575 F.2d at 957; *Miller v. United States,* 564 F.2d at 106.

Where there is no adequate inquiry on the record, the burden of proof shifts to the government. On direct appeal, from convictions in the district courts, the government must demonstrate from the record that prejudice was "improbable." On collateral attack, by a federal prisoner, under

28 U.S.C. §2255, the government must establish the "unlikelihood of prejudice" by a preponderance of the evidence. *United States v. Foster*, 469 F.2d at 5.

Retained/ Appointed

The court draws no distinction between retained and appointed counsel. *United States v. Foster*, 469 F.2d at 4 n.2.

Joint/ Separate Trials

In *Marxuach v. United States*, 398 F.2d 548, 552 (1st Cir.), *cert. denied*, 393 U. S. 982 (1968), the court noted that, where there was a severance, it was more reasonable to have the same attorney represent both defendants. (Severance was due to feigned illness of co-defendant.)

SECOND CIRCUIT

Standard

A jointly represented defendant, who claims a conflict of interest, must show "some specific instance of prejudice, some real conflict of interest, resulting from a joint representation." *United States v. Lovano*, 420 F.2d 769, 773 (2d Cir.), *cert. denied*, 397 U.S. 1071 (1970).

Duty to Inquire

In *United States v. DeBerry*, 487 F.2d 448, 452-453 (2d Cir. 1973), the court announced a prospective rule that the district courts must conduct a careful inquiry of jointly represented defendants regarding the potential for a conflict of interest in the joint representation.

Review of State Court Convictions

In *Salomon v. LaValle*, 575 F.2d 1051, 1055 (2d Cir. 1978), the court specifically reserved decision on whether the court's supervisory rule, requiring an inquiry by

the trial court and the attending shift in the burden of proof absent a satisfactory inquiry, would apply to a review of a state court conviction. 575 F.2d at 1055. *But see Colon v. Fogg*, 603 F.2d 403 (2d Cir. 1979), where the court, in a case involving Salomon's co-defendant, without any discussion of the issue, reversed the district court's order and ruled that the state failed to meet its burden of proving the absence of prejudice.

Burden of Proof

Where the district court conducts an inquiry, on appeal, the defendant bears the burden of proving that prejudice resulted. *Salomon v. LaVallee*, 575 F.2d 1051 (2d Cir. 1978). Absent a satisfactory inquiry on the record, the burden of proof shifts to the government, and the government must establish the "lack of prejudice." *United States v. Carrigan*, 543 F.2d 1053, 1055 (2d Cir. 1976); *Salomon v. LaVallee*, 575 F.2d 1051, 1055 (2d Cir. 1978).

Retained/ Appointed

No distinction drawn. *See United States v. Carrigan*, 543 F.2d 1053, 1057 (2d Cir. 1976).

THIRD CIRCUIT

Standard

Burden of Proof

Representation of co-defendants by the same attorney is not a *per se* violation of the Sixth Amendment. A defendant has the burden of showing a possible conflict of interest or prejudice, however remote, before a reviewing court will find joint representation constitutionally defective.

Walker v. United States, 422 F.2d 374, 375 (3d Cir.) (*per curiam*), *cert. denied*, 399 U.S. 915 (1970)

Duty to Inquire

No *per se* rule requiring inquiry. *United States ex rel. Hart v. Davenport*, 478 F.2d 203, 211 (3d Cir. 1973).

No supervisory rule requiring inquiry; however, inquiry is the suggested procedure in joint representation cases. *United States ex rel. Hart v. Davenport*, 478 F.2d at 211.

Retained/ Appointed

No distinction drawn. *United States ex rel. Hart v. Davenport*, 478 F.2d at 211.

FOURTH CIRCUIT

Standard

"[S]ome specific instance of prejudice, some real conflict of interest, resulting from the joint representation must be shown to exist before it can be said that an appellant has been denied the effective assistance of counsel." *United States v. Atkinson*, 565 F.2d 1283, 1284 (4th Cir. 1977), *cert. denied*, 436 U.S. 944 (1978) (quoting *United States v. Lovano*, 420 F.2d 769, 773 (2d Cir. 1970).

Although in a prior case, the Fourth Circuit quoted the Third Circuit standard with approval (*United States v. Truglio*, 493 F.2d 574 (4th Cir. 1974)), that case was distinguished in *Atkinson* where the court noted that "[i]n [Truglio] . . . the record disclosed a patent conflict of interest which impaired the defendant's right to the unfettered and effective assistance of

counsel." *United States v. Atkinson*, 565 F.2d at 1284.

Burden of Proof

Burden of proof is on defendant to show that his constitutional rights were violated. *Post v. Boles*, 332 F.2d 738 (4th Cir. 1964), *cert. denied*, 380 U.S. 981 (1965).

Duty to Inquire

Inquiry may be advisable, especially where defendants have court-appointed counsel, but failure to inquire does not obviate the need to show a real conflict of interest. *United States v. Atkinson*, 565 F.2d at 1284.

Retained/ Appointed

United States v. Atkinson, 565 F.2d 1283, inferentially suggests a greater need to inquire if counsel is appointed.

FIFTH CIRCUIT

Standard

The burden is on the defendant to prove an "actual, significant conflict." *Foxworth v. Wainwright*, 516 F.2d 1072, 1077 n.7 (5th Cir. 1975). "An alleged conflict that obstructs the use of a particular strategy or defense is not significant unless the defense is plausible." *Id.* at 1080. *Zuck v. Alabama*, 588 F.2d 436, 439 (5th Cir. 1979), *petition for cert. filed*, 47 U.S.L.W. 3829 (U.S. May 21, 1979) (No. 78-1741).

Duty to Inquire

The court must inquire in retained counsel situations only when the conflict is so apparent that the judge "should have been aware of and corrected it." *Alvarez v. Wainwright*, 522 F.2d 100, 105 n.111 (5th Cir. 1975).

Retained/ Appointed

In court-appointed cases, the trial court "may be under an affirmative duty to inquire" when counsel informs the court of a possible conflict. Without such notice, however, "the [c]ourt does not bear the responsibility of informing co-defendants of possible problems of joint representation." *Gov't of Canal Zone v. Hodges*, 589 F.2d 207, 209 (5th Cir.), *cert. denied*, 99 S.Ct. 2173 (1979).

SIXTH CIRCUIT

Standard

Burden of Proof

In *United States v. Woods*, 544 F.2d 242, 269 (6th Cir 1976), *cert. denied*, 430 U.S. 969 (1977), the court held that, where a conflict of interest is alleged, the defendant has the burden of proving "some actual prejudice" or an "actual conflict of interest." *See also United States v. Cale*, 418 F.2d 897, 899 (6th Cir. 1969), *cert. denied*, 397 U.S. 1015 (1970). The "mere possibility" of conflict is insufficient to overturn a conviction. *Thacker v. Bordenkircher*, 590 F.2d 640, 641 (6th Cir.), *cert. denied*, 99 S.Ct. 2827 (1979); *United States v. LaRiche*, 549 F.2d 1088, 1095 (6th Cir.), *cert. denied*, 430 U.S. 987, *cert. denied sub nom. Cisternino v. United States*, 434 U.S. 966 (1977).

Duty to Inquire

The court declined to adopt a *per se* rule requiring district judges to conduct a pretrial conflict of interest hearing in all cases of joint representation by retained counsel. *United States v. Steele*, 576 F.2d 111, 112 (6th Cir.), *cert. denied*, 439 U.S. 928 (1978).

Review of State Court Convictions

"In a habeas corpus action where the highest court of the [s]tate declares in an opinion that it has reviewed the evidence and failed to find any conflict and the district court has reached the same conclusion we require a clear showing of error before we will set aside these findings." *Thacker v. Bordenkircher*, 590 F.2d at 641.

Retained/ Appointed

"[P]rivately retained counsel's determination that there was no conflict of interest must weigh heavily" against the defendant. *United States v. Cale*, 418 F.2d at 898. *See also United States v. Martinez*, 428 F.2d 86, 87 (6th Cir. 1970), *cert. denied*, 402 U.S. 951 (1771).

Miscellaneous Considerations

Failure to raise the alleged conflict or request a severance in the lower court appears to be a factor weighing against finding an actual conflict. *See United States v. Jones*, 436 F.2d 971, 972 (6th Cir. 1971); *United States v. Martinez*, 428 F.2d at 87.

SEVENTH CIRCUIT

Standard

Burden of Proof

Defendant has burden "to demonstrate, with a reasonable degree of specificity, that a conflict of interests actually existed at trial." *United States v Mandell*, 525 F.2d 671, 677 (7th Cir. 1975), *cert. denied*, 423 U.S. 1049 (1976); *United States ex rel. Robinson v. Housewright*, 525 F.2d 988, 994 (7th Cir. 1975). The court explicitly notes that it does "not adopt as low a stan-

dard of proof as that articulated by the Third Circuit in its decisions." *United States v. Mandell*, 525 F.2d at 677 n.11.

Duty to Inquire

The court places the responsibility on defense counsel to inform defendants of potential dangers of multiple client representation. Trial court must watch for *indicia* of conflict during trial. *United States v. Mavrick*. 601 F.2d 921, 929 (7th Cir. 1979); *United States v. Mandell*, 525 F.2d at 677.

Where possibility of conflict appears during trial, court must investigate relevant facts, advise defendants, and determine whether continued representation, absent a waiver, violates the Sixth Amendment. When actual conflict appears, the court must bring the fact of its existence, and the resulting dangers, to the attention of each defendant so that an informed judgment can be made about securing new counsel. The court rejects D.C. Circuit rule. *United States v. Gaines*, 529 F.2d 1038, 1043-1044 (7th Cir. 1976). Where the trial court is informed of a conflict by defendant's attorney, he must appoint separate counsel, or take adequate steps to determine if risk of conflict is too remote to warrant separate counsel. *United States ex rel. Garrett v. Lane*, 464 F. Supp. 793 (E.D. Ill. 1979).

Retained/ Appointed

The court notes that "we do not conceive the duty resting upon appointed counsel to be any less than upon retained counsel insofar as avoiding conflict of interest is

concerned." *United States ex rel. Robinson v. Housewright*, 525 F.2d at 994 n.8.

"[I]n the case of appointed counsel, it is especially important for the [trial] court to determine that no prejudice will result from multiple representation." *United States v. Gougis*, 374 F.2d 758, 761 (7th Cir. 1967). The court specifically reserves decision on the question of whether a defendant's right to counsel of his own choice includes the selection of an attorney who has a conflict of interest. *United States v. Gaines*, 529 F.2d at 1043.

EIGHTH CIRCUIT

Standard

A defendant raising a conflict of interest has the burden to show an "actual conflict" or a "substantial possibility of a conflict." *United States v. Cox*, 580 F.2d 317, 323 (8th Cir. 1978), *cert. denied*, 439 U.S. 1075 (1979). Only a minimal showing is required. *Beran v. United States*, 580 F.2d 324, 326 (8th Cir. 1978), *cert. denied*, 99 S.Ct. 1422 (1979).

Duty to Inquire

In *United States v. Williams*, 429 F.2d 158, 161 (8th Cir.), *cert. denied*, 400 U.S. 947 (1970), the court announced a prospective rule that the district courts must conduct a "careful inquiry" regarding the "possibility of a conflict of interest" before *appointing* an attorney to jointly represent co-defendants. In *United States v. Lawriw*, 568 F.2d 98 (8th Cir. 1977), *cert. denied*, 435 U.S. 969 (1978), the court ex-

tended this inquiry to cases where co-defendants are jointly represented by *retained* counsel; in *United States v. Cox*, 580 F.2d 317, 321 (8th Cir. 1978), this latter ruling was held prospective.

Burden of Proof

The defendant has the burden of proof, and the burden does not shift to the government, even in the absence of an inquiry by the trial court. *United States v. Lawriw*, 568 F.2d at 105. However, as to the issue of whether the defendant *waived* his right to separate counsel, the burden of proof is upon the government. *Austin v. Erickson*, 477 F.2d 620, 626 (8th Cir. 1973).

Retained/ Appointed

The court draws no distinction but notes that it is a proper factor to consider in determining whether a defendant waived his right to separate counsel. *Larry Buffalo Chief v. South Dakota*, 425 F.2d 271, 279 n.5 (8th Cir. 1970).

NINTH CIRCUIT

Standard

Burden of Proof

Defendant bears burden of demonstrating that specific prejudice has resulted from alleged conflict of interest. *United States v. Partin*, 601 F.2d 1000, 1009 (9th Cir. 1979). *United States v. Eaglin*, 571 F.2d 1069, 1086 (9th Cir. 1977), *cert. denied*, 435 U.S. 906 (1978).

Counsel may represent more than one defendant if interests of latter are not in conflict. *Carlson v. Nelson*, 443 F.2d 21, 22 (9th Cir. 1971).

Defendant may waive right to counsel with undivided loyalty. *United States v. Partin*, 601 F.2d at 1007.

Duty to Inquire

If challenge is on ground that counsel represents more than one defendant, court, absent unusual circumstances, will reject claim if trial court made sufficient inquiry of parties and counsel about possible conflicts. *United States v. Eaglin*, 571 F.2d at 1086. Court must be able to rely on counsel's representation that possibility of conflict does or does not exist. *United States v. Horne*, 423 F.2d 630, 631 (9th Cir. 1970) (representation made by counsel pre-trial).

Retained/ Appointed

Court holds that competency of counsel is to be judged by same standard, whether counsel is retained or appointed. Thus, the fact that counsel was retained is not an absolute bar to a claim of ineffective assistance of counsel. Court reserves question of whether, in a particular case, a different standard may be applicable where counsel is retained rather than appointed. *United States v. Marshall*, 488 F.2d 1169, 1193 (9th Cir. 1973).

Review of State Court Convictions

State habeas petitioner has burden of establishing specific prejudice. *Davidson v. Cupp*, 446 F.2d 642, 643 (9th Cir. 1971).

Standard

The court has not formulated a particular standard, *Fryar v. United States*, 404 F.2d 1071, 1073 n.2 (10th Cir. 1968), *cert. denied*, 395 U.S. 964 (1969), but has held that the conviction will be affirmed absent a showing of prejudice, *United States v. Smith*, 464 F.2d 194, 197 (10th Cir.), *cert. denied*, 409 U.S. 1066 (1972); *Fryar v. United States*, 404 F.2d at 1073, or an actual conflict of interest. *See McHenry v. United States*, 420 F.2d 927, 928 (10th Cir. 1970); *Jones v. Baker*, 406 F.2d 739, 740 (10th Cir. 1969).

Burden of Proof

The burden of proof appears to be upon the defendant, *Mesch v. United States*, 407 F.2d 1290, 1290-1291 (10th Cir.), *cert. denied*, 396 U.S. 826 (1969), *Fryar v. United States*, 404 F.2d at 1073, but the court will examine the entire record under the totality of the circumstances. *United States v. McCoy*, 573 F.2d 14, 17 (10th Cir.) *cert. denied*, 436 U.S. 958 (1978); *McHenry v. United States*, 420 F.2d 927, 928 (10th Cir., 1970).

Duty to Inquire

The Tenth Circuit has held that the "procedural fact" that the trial court failed to make a pre-trial inquiry into the possibility of a conflict is not determinative, absent a showing of prejudice. *Mesch v. United States*, 407 F.2d at 1290.

Appointed/ Retained

The court, in *Fryar v. United States*, 404 F.2d at 1073, suggested the appointment of separate counsel for indigent co-defendants.

Standard

Relying upon 18 U.S.C. §3006(a)(b), the court, in *Ford v. United States*, 379 F.2d 123, 125-126 (D.C. Cir. 1967) adopted a prospective rule that separate counsel should be initially appointed in every case, with an instruction that, if counsel concludes, after fully investigating the case and consulting with his client, that the defendant will best be served by joint representation, counsel's conclusion with supporting reasons, should be communicated to the court for an on-the-record disposition.

Duty to Inquire

Where counsel is retained, the trial court has a duty to make a determination that co-defendants have intelligently chosen to be jointly represented. *United States v. Liddy*, 348 F.Supp. 198, 200 (D. D.C. 1972).

Prior to the court's pronouncement in *Ford*, the court had held that, where there are indications in the record that "stir doubts" about the effectiveness of joint representation, those doubts should be resolved in favor of the defendant, especially where there has been no inquiry by the trial court. *Lollar v. United States*, 376 F.2d 243, 247 (D.C. Cir. 1967). Where there can be "an informed speculation" that defendant was prejudiced, a new trial will be granted. *Lollar v. United States*, 376 F.2d at 247. *Cf. United States v. Mackin*, 502 F.2d 429, 439 (D.C. Cir.), *cert. denied*, 419 U.S. 1052 (1974) where

the court rejected defendant's claim of conflict on the ground that "[t]he charge of prejudice [was] speculative, without even gossamer support in the record."

Burden of Proof

"[W]here the record does not show that co-defendants' decision to proceed with one attorney was an informed one, the burden is on the [g]overnment to show beyond a reasonable doubt that the denial of the defendants' rights is harmless error, . . ." *Ford v. United States*, 379 F.2d at 125 (citation omitted). However, it appears that the defendant has the burden of going forward with the evidence, and must state a claim upon which relief could be granted before the burden of proof shifts to the government. *United States v. McCord*, 509 F.2d 344, 352 and n.65, 355 n.69 (D.C. Cir. 1974), *cert. denied*, 421 U.S. 930 (1975).

Retained/ Appointed

The court noted that it will closely scrutinize cases where counsel is *appointed* rather than retained. *Lollar v. United States*, 376 F.2d at 247. However, in *Campbell v. United States*, 352 F.2d 359 (D.C. Cir. 1965), the court held that the mere fact that counsel was retained does not relieve the trial court of its duty to inquire.

Separate/ Joint Trial

In *United States v. Thornton*, 462 F.2d 307 (D.C. Cir. 1972), a *per curiam* opinion, the court summarily stated that, as the cases were separately tried, no prejudice resulted from counsel's representation of the co-defendant.

II. STATE CASES

1. Twenty-six states require that the defendant establish an actual conflict of interest or prejudice, or adopt a similar test.

Arizona: *State v. Davis*, 110 Ariz. 29, 514 P.2d 1025 (Sup. Ct. 1973) ("actual conflict").

Arkansas: *Holloway v. State*, 260 Ark. 250, 539 S.W. 2d 435 (Sup. Ct. 1978), *rev'd., Holloway v. Arkansas*, 435 U.S. 475 (1978) ("some material basis for an alleged conflict of interest;" "some factual demonstration of a conflict of interest").

Colorado: *People v. Romero*, 189 Colo. 526, 543 P.2d 56 (Sup. Ct. 1975) ("some specific instance of prejudice, some real conflict of interest").

Connecticut: *State v. Marion*, 175 Conn. 211, 397 A.2d 533 (Sup. Ct. 1978) ("some factual basis that a conflict of interest actually existed").

Delaware: *Hill v. State*, 316 A.2d 557 (Sup. Ct. 1974) ("some conflict must be established").

Florida: *Belton v. State*, 217 So.2d 97 (Sup. Ct. 1978) (failure to appoint separate counsel not error if no objection unless defendant shows conflict of interest or some prejudice resulting from representation).

Georgia: *Munford v. Seay*, 241 Ga. 223, 244 S.E.2d 857 (Sup. Ct. 1978) ("must show a conflict harmful to himself").

Idaho: *State v. Oldham*, 92 Idaho 124, 438 P.2d 275 (Sup. Ct. 1968) ("the facts [must]

show that the interests of the two defendants are in conflict").

Illinois: *People v. Vriner*, 74 Ill. App.3d 329, 24 Ill. Dec. 520, 385 N.E.2d 671 (Sup. Ct. 1978), *cert. denied, Vriner v. Illinois*, 99 S.Ct. 2858 (1979) ("actual conflict of interest manifested at trial").

Indiana: *Patterson v. State*, 386 N.E.2d 936 (Sup. Ct. 1979) ("actual existence of a conflict").

Iowa: *Jackson v. Auger*, 239 N.W.2d 180 (Sup. Ct. 1976) ("substantial possibility that the situation of dual representation created a conflict").

Louisiana: *State ex rel. Thompson v. Henderson*, 306 So.2d 713 (Sup. Ct. 1975) ("actual conflict of interest").

Maryland: *Pressley v. State*, 220 Md. 558, 155 A.2d 494 (Ct. App. 1959) ("To show prejudice there must be revealed an actual or imminently potential conflict of interest which prevented a lawyer from impartially and adequately representing his clients").

Massachusetts: *Commonwealth v. Soffen*, 386 N.E.2d 1030 (Sup. Jud. Ct. 1979) (where attorney represents co-defendants at separate proceedings, defendant must show a "genuine conflict of interest;" or "if a more tenuous conflict appears, we might still reverse the judgment on a showing of material prejudice." If attorney represents multiple defendants at same trial, court must make inquiry. See Section 2, *infra*).

Mississippi: *Irving v. State*, 361 So.2d 1360 (Sup. Ct. 1978), *cert. denied, Irving v. Mississippi*, 99 S. Ct. 2014 (1979) ("no conflict of interest;" "[no] prejudice or harm resulting to appellant on account of the alleged conflict").

Missouri: *Mason v. State*, 468 S.W.2d 617 (Sup. Ct. 1971) ("whether conflict of interest of counsel . . . actually existed").

Montana: *State v. Henry*, 582 P.2d 321 (Sup. Ct. 1978) ("actual conflict of interest prejudicing his defense").

New York: *People v. Gomberg*, 38 N.Y.2d 307, 379 N.Y.S.2d 769, 342 N.E.2d 550 (Ct. App. 1975) ("A conflict exists only when the individual defenses 'run afoul of each other' ").

North Carolina: *State v. Engle*, 5 N.C.App. 101, 167 S.E.2d 864 (Ct. App. 1969) ("some conflict of interest must be shown").

Oklahoma: *Wright v. State*, 505 P.2d 507 (Crim. App. 1973) (no denial "unless a conflict of interest or prejudice results").

Pennsylvania: *Commonwealth v. Breaker*, 456 Pa. 341, 318 A.2d 354 (Sup. Ct. 1974) ("conflict of interest actually existed at trial").

South Dakota: *State v. Means*, 268 N.W.2d 802 (Sup. Ct. 1978) ("some specific instance of prejudice, some real conflict of interest").

Texas: *Stutes v. State*, 530 S.W.2d 309 (Crim. App. 1975) ("actual conflict of interest" where counsel appointed).

Washington: *State v. Myers*, 86 Wash.2d 419, 545 P.2d 538 (Sup. Ct. 1976) ("must be some prejudice to a defendant").

West Virginia: *State ex rel. Postelwaite v. Bechtold*, 212 S.E.2d 69 (Sup. Ct. App. 1975), *cert. denied, Postelwaite v. Bechtold*, 424 U.S. 909 (1976) ("actual conflict").

Wisconsin: *State v. Medrano*, 84 Wis.2d 11, 267 N.W. 2d 586 (Sup. Ct. 1978) ("actual conflict").

2. Five states require the trial court to advise the defendant of the potential dangers inherent in joint representation; in the absence of an adequate inquiry on the record, the burden of proof shifts to the prosecution to show the absence of a prejudicial conflict.

Alaska: *Moreau v. State*, 588 P.2d 275 (Sup. Ct. 1978).

Massachusetts: *Commonwealth v. Davis*, 384 N.E.2d 181 (Sup. Jud. Ct. 1978) (where attorney represents co-defendants at joint trial).

Minnesota: *State v. Olsen*, 258 N.W.2d 898 (Sup. Ct. 1977).

New Jersey: *State v. Land*, 73 N.J. 24, 372 A.2d 297 (Sup. Ct. 1977) (absent colloquy and waiver on record, if a potential conflict exists, prejudice is presumed).

New York: *People v. Gomberg*, 38 N.Y.2d 307, 379 N.Y.S.2d 769, 342 N.E.2d 550 (Ct. App. 1975) (but court "must be careful not to pursue its inquiry too far as it may infringe upon the defendant's right to retain and confer with counsel of his own choice").

See also *People v. Cook*, 13 Cal. 3d 663, 119 Cal. Rptr. 500, 532 P.2d 148 (Cal. Sup. Ct. 1975) (where multiple defendants freely and voluntarily retain joint counsel, "it is extremely doubtful that defendants' right to retain counsel of their own choice could or should be challenged by the trial court").

3. Four states will grant relief under certain circumstances upon a showing of less than an actual conflict of interest.

California: *People v. Cook*, 13 Cal. 3d 663, 119 Cal. Rptr. 500, 532 P.2d 148 (Sup. Ct.), *cert. denied, Cook v. California*, 423 U.S. 870 (1975) ("informed speculation," which must be grounded upon a factual basis in the record, that there was a potential conflict of interest which prejudicially affected the right to effective counsel, where counsel is appointed, the court has the burden of ascertaining whether a potential conflict exists, and the defendant will be entitled to relief upon a showing of some prejudice. Where counsel is retained, relief will be granted only if the trial was a "farce or a sham").

Maryland: *Pressley v. State*, 220 Md. 558, 155 A.2d 494 (Ct. App. 1959) ("actual or imminently potential conflict," but no relief granted where the defendant does not object, or where no prejudice is established).

Massachusetts: *Commonwealth v. Soffen*, 386 N.E.2d 1030 (Sup. Jud. Ct. 1979) ("genuine conflict of interest," but "if a more tenuous conflict

appears, we might still reverse the judgment on a showing of material prejudice").

New Hampshire: *State v. Theodore*, 392 A.2d 122 (Sup. Ct. 1978) (in *dicta*, the court stated that "a conviction must be reversed whenever there is more than a remote possibility that a criminal defendant was prejudiced by his attorney's simultaneous representation of another defendant").

4. Six states draw an explicit distinction between joint representation by retained and by appointed counsel.

Alabama: *Lee v. State*, 57 Ala.App. 366, 328 So.2d 617 (Crim. App. 1976), *cert. denied*, 295 Ala. 409, 328 So.2d 624 (Sup. Ct. 1976) ("it is less difficult to find an infringement of one's Sixth Amendment right" where counsel is appointed).

California: *People v. Cook*, 13 Cal.3d 663, 119 Cal. Rptr. 500, 532 P.2d 148 (Sup. Ct. 1975) (where counsel is appointed, the Court has the burden of ascertaining whether a potential conflict exists, and the defendant will be entitled to relief upon a showing of some prejudice. Where counsel is retained, relief will be granted only if the trial was a "farce or a sham").

Montana: *State v. Meidinger*, 160 Mont. 310, 502 P.2d 58 (Sup. Ct. 1972) ("where two defendants desire to retain one counsel their decision should be honored").

Oklahoma: *Wright v. State*, 505 P.2d 507 (Crim. App. 1973) ("We hold that these defendants

cannot now be heard to complain of any error committed by counsel whom they selected and retained").

Tennessee: *Leeper v. State*, 4 Tenn.Crim. 404, 472 S.W.2d 240 (Crim. App. 1971) (acts or non-acts of retained counsel are not imputable to the state).

Texas: *Stutes v. State*, 530 S.W.2d 309 (Crim. App. 1975) (where counsel is appointed, relief granted upon showing actual conflict. Where counsel is retained, no relief unless the "representation was fettered or restrained by his commitments to others, and such commitments were unknown to the defendant").

5. Twelve states have as yet articulated no clear standard of review.

Alabama: *Lee v. State*, 57 Ala.App. 366, 328 So.2d 617 (Crim. App. 1976) (conviction affirmed, court notes that any potential conflict was outweighed by the defendant's desire to have counsel jointly represent his spouse).

Kansas: *See, e.g., State v. Nelson*, 207 Kan. 794, 486 P.2d 1330 (Sup. Ct. 1971) (conviction affirmed where record shows no conflict). *But see State v. Sullivan*, 210 Kan. 842, 504 P.2d 190 (Sup. Ct. 1972) (conviction reversed where attorney objected to joint trial due to conflict).

Kentucky: *Ware v. Commonwealth*, 537 S.W.2d 174 (Sup. Ct. 1976) (appointment of separate

counsel "strongly suggested," but conviction affirmed where no actual conflict existed or developed during trial).

Maine: *Gayton v. Robbins*, 272 A.2d 776 (Sup. Jud. Ct. 1971) (conviction affirmed where defendant did not object to joint representation at trial and does not claim existence of conflict or prejudice).

Michigan: *People v. Bentley*, 402 Mich. 121, 261 N.W.2d 716 (Sup. Ct. 1978) (conviction reversed *per curiam* where motion to sever brought to court's attention conflict of interest and potential for prejudice).

Nebraska: *State v. Montgomery*, 182 Neb. 737, 157 N.W.2d 196 (Sup. Ct. 1968) (conviction reversed where conflict of interest apparent from admission of co-defendant's confession implicating defendant).

New Mexico: *State v. Tapia*, 75 N.M. 757, 411 P.2d 234 (Sup. Ct. 1966) (conviction reversed where conflict of interest apparent from admission of co-defendant's confession implicating defendant).

South Carolina: *Myers v. State*, 248 S.C. 539, 151 S.E.2d 665 (Sup. Ct. 1966) (conviction affirmed where defenses consistent and defendant made voluntary decision not to testify).

Tennessee: *Moran v. State*, 4 Tenn.Crim. 339, 472 S.W.2d 238 (Crim. App. 1971) (conviction reversed where conflict apparent; co-defendant entered guilty plea and testified against defendant).

Utah: *State v. Tippets*, 584 P.2d 892 (Sup. Ct. 1978) (conviction affirmed where record shows no prejudice or conflict, and it does not appear that attorney was less effective than he would have been if he had represented only one defendant).

Vermont: *State v. Truman*, 124 Vt. 285, 204 A.2d 93 (Sup. Ct. 1964) (conviction affirmed where defendant made no showing that joint representation "in any way embarrassed or jeopardized his fidelity" to the defendant's cause).

Virginia: *Penn v. Smyth*, 188 Va. 367, 49 S.E.2d 600 (Sup. Ct. App. 1948) (conviction affirmed where defendant alleged no facts showing that he suffered prejudice).

Research has disclosed no reported cases by a court of statewide jurisdiction concerning this issue in seven states: Hawaii, Nevada, North Dakota, Ohio, Oregon, Rhode Island, and Wyoming.

III. THE BRITISH COMMONWEALTH

In Britain and the Commonwealth nations, questions raised by joint representation are determined not by appellate courts but are left to the bar's rule-making and enforcement mechanisms. *See generally* W. W. Boulton, B.A., *A Guide to Conduct and Etiquette at the Bar* 21-35 (4th Ed. 1965). In general, counsel shall not appear for two clients whose interests may conflict, although counsel may represent multiple defendants if he has satisfied himself that all defendants have agreed to joint representation. The British Legal Aid Act provides that the court may

assign one counsel to represent two or more persons whose cases are to be heard together, unless the interests of justice require that the defendants be separately represented. *See* Halsbury's Laws of England (4th Ed.), Vols. 3 and 11; English and Empire Digest, Vol. 3; Legal Aid Act 1974, §28 *et seq.*; Annual Statement of the General Council of the Bar 1970-1971, at 32.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1979

No. 78-1832

JULIUS T. CUYLER, SUPERINTENDENT
and
DISTRICT ATTORNEY OF PHILADELPHIA,
Petitioner,

v.

JOHN SULLIVAN,
Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES
COURT OF APPEALS FOR THE THIRD CIRCUIT

BRIEF FOR RESPONDENT

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TABLE OF CONTENTS

Page

TABLE OF CITATIONS ..... (ii)

STATEMENT 1

SUMMARY OF ARGUMENT 12

ARGUMENT:

I. THE THIRD CIRCUIT'S ORDER GRANTING RESPONDENT'S WRIT OF HABEAS CORPUS WAS COMPELLED BY SUBSTANTIAL RECORD EVIDENCE OF ACTUAL CONFLICTS OF INTEREST AND PREJUDICE OCCASIONED BY THE JOINT REPRESENTATION OF RESPONDENT BY TWO ATTORNEYS WHO ALSO REPRESENTED TWO CO-DEFENDANTS 17

A. Actual conflict in the representation of the respondent by the lawyers who also represented his co-defendants began long before trial and unconstitutionally affected trial strategy. 20

B. Trial strategy reveals ongoing divided loyalties and failure to put on a defense in the face of respondent's request to call witnesses known to all parties whose testimony was directly relevant to the defense. 22

II. THE THIRD CIRCUIT STANDARD THAT A POSSIBILITY OF PREJUDICE OR CONFLICT OF INTEREST, HOWEVER REMOTE, IN THE JOINT REPRESENTATION OF TWO OR MORE DEFENDANTS BY A SINGLE ATTORNEY COMPELS REVERSAL IS IN FUNDAMENTAL AGREEMENT WITH THAT OF SIX OTHER CIRCUITS, AND IN ANY EVENT CERTIORARI WAS IMPROVIDENTLY GRANTED IN THE IN-

STANT CASE IF THOUGHT TO BE EMBLEMATIC OF A DISAGREEMENT AMONG THE CIRCUITS 40

III. BECAUSE STATE ACTION IS UNQUESTIONABLY PRESENT BY REASON OF JUDGMENTS OF THE STATE COURT IMPOSING CONSECUTIVE LIFE SENTENCES, AND BECAUSE RESPONDENT HAS ADDITIONALLY A SIXTH AMENDMENT RIGHT TO ENJOY THE ASSISTANCE OF COUNSEL, THE REQUIREMENTS OF THE SIXTH AND FOURTEENTH AMENDMENTS HAVE BEEN MET 50

IV. THE THIRD CIRCUIT DID NOT VIOLATE APPROPRIATE LIMITS OF APPELLATE REVIEW, NOR DID IT ENGAGE IN DE NOVO FACT FINDING 60

V. THE LIKELIHOOD THAT CONFLICTS OF INTEREST WILL OCCUR WHENEVER AN ATTORNEY REPRESENTS MULTIPLE CLIENTS IS SO GREAT THAT A PROPHYLACTIC RULE PROHIBITING JOINT REPRESENTATION SHOULD BE ORDERED BY THIS COURT 68

A. The Courts are unable to fulfill the constitutional obligation to protect the rights of defendants who are jointly represented. 69

B. Where the courts have looked to members of the bar to bear the responsibility of insuring that the Sixth Amendment is not violated, that expectation is unfulfilled. 74

CONCLUSION 80

TABLE OF CITATIONS

United States Cases:

Boulden v. Holman, 394 U.S. 478 (1969) 53

Boykin v. Alabama, 395 U.S. 238 (1969) 54

Fay v. Noia, 372 U.S. 391 (1963) 64

Ferri v. Ackerman, ____ U.S. ____ (No. 78-5981, decided December 4, 1979) 15, 53

Flagg Bros., Inc. v. Brooks, 436 U.S. 149 (1978) 51

Gideon v. Wainwright, 372 U.S. 335 (1963) 69

Glasser v. United States, 315 U.S. 60 (1942) ..... *passim*

Haynes v. Washington, 373 U.S. 503 (1963) 62

Herring v. New York, 422 U.S. 853 (1975) 55

Holloway v. Arkansas, 435 U.S. 371 (1978) ..... *passim*

Johnson v. Zerbst, 304 U.S. 458 (1938) 16, 42, 72

Lakeside v. Oregon, 435 U.S. 333 (1978) 54

Leis v. Flynt, 429 U.S. 438 (1979) 52

McMann v. Richardson, 397 U.S. 759 (1970) 51

Napue v. Illinois, 360 U.S. 264 (1958) 57

Neil v. Biggers, 409 U.S. 188 (1972) 15, 62, 63

Shelley v. Kraemer, 334 U.S. 1 (1948) 57

Townsend v. Sain, 372 U.S. 293 (1963) 15, 68

Von Moltke v. Gillies, 322 U.S. 708 (1949) 22

Federal Cases:

Austin v. Erickson, 477 F.2d 620 (8th Cir. 1973) .. 45, 48, 74

Beran v. United States, 580 F.2d 324 (8th Cir. 1978), *cert. denied*, ____ U.S. ____, 99 S. Ct. 1422 (1979) 45

Campbell v. United States, 352 F.2d 359 (D.C. Cir. 1965) 43

Castillo v. Estelle, 504 F.2d 1243 (5th Cir. 1974) 35

Colon v. Fogg, 602 F.2d 403 (2d Cir. 1978) 42, 43

Dodge v. Johnson, 471 F.2d 1249 (6th Cir. 1973) 62
Fitzgerald v. Estelle, 505 F.2d 1334 (5th Cir. 1975) 51, 59
Government of the Virgin Islands v. Hernandez, 476 F.2d 791 (3rd Cir. 1972) 43
Kaplan v. Bombard, 573 F.2d 708 (2nd Cir. 1978) 42, 44
Lollar v. United States, 376 F.2d 243 (D.C. Cir. 1967) 20
Moore v. United States, 432 F.2d 730 (3rd Cir. 1970) 19
Porter v. United States, 298 F.2d 461 (5th Cir. 1962) 22, 59, 76
Sawyer v. Brough, 358 F.2d 70 (4th Cir. 1966) 44
Stephens v. United States, 595 F.2d 1066 (5th Cir. 1979) 59, 74
United States v. Alvarez, 580 F.2d 1251 (5th Cir. 1978) 49, 59
United States v. Atkinson, 565 F.2d 1283 (4th Cir. 1977), *cert. denied*, 436 U.S. 944 (1978) 44
United States v. Carrigan, 543 F.2d 1053 (2d Cir. 1976) 44, 72
United States v. DeBerry, 487 F.2d 448 (2d Cir. 1973) 44
United States v. Dolan, 570 F.2d 1177 (3rd Cir. 1978) 34, 72
United States v. Donahue, 560 F.2d 1039 (1st Cir. 1972) 44
United States v. Foster, 469 F.2d 1 (1st Cir. 1977) 44
United States v. Lawriw, 568 F.2d 98 (8th Cir. 1977) 70, 74
United States v. Mandell, 525 F.2d 671 (7th Cir. 1975), *cert. denied*, 423 U.S. 1049 (1976) 45
United States v. Mari, 526 F.2d 117 (2d Cir. 1975) 76
United States v. Truglio, 493 F.2d 574 (4th Cir. 1974) 45, 70

United States ex rel. Green v. Rundle, 434 F.2d 1112 (3rd Cir. 1970) 19
United States ex rel. Hart v. Davenport, 478 F.2d 203 (3rd Cir. 1973) ..... *passim*
United States ex rel. O'Brien v. Maroney, 423 F.2d 865 (3rd Cir. 1970) 51
United States ex rel. Sullivan v. Cuyler, 593 F.2d 512 (3rd Cir. 1979) ..... *passim*
Walker v. United States, 422 F.2d 374 (3rd Cir. 1970) 18, 41, 45
Zuck v. Alabama, 588 F.2d 436 (5th Cir. 1979) 48, 59
United States v. Garafola, 428 F. Supp 620 (J. D. N.J. 1977) 34, 72, 73, 76

State Cases:

Commonwealth v. Pass, Pa., 306 A.2d 167 (1976) 35
Commonwealth ex rel. Whitling v. Russell, Pa., 170 A.2d 641 (1962) 45, 74
Globe Woolen Company v. Utica Gas and Electric Company, 224 N.Y. 483, 121 N.E. 378 (1918) 31
Meinhard v. Salmon, 249 N.Y. 458, 164 N.E. 545 (1928) 30

United States Constitution and Statutes:

U.S. Const. amend. VI 17, 43, 45, 53, 69
U.S. Const. amend. XIV, §§1, 5 ..... 18, 51,
28 U.S.C. §2254(d)(1), (8) 50, 51, 61, 64

Miscellaneous Authorities:

ABA, Code of Professional Responsibility, EC 5-15, 5-114 ..... 74, 75
Burger, *Counsel for the Prosecution and Defense– Their Roles Under the Minimum Standards*, 8 Amer. Crim. Law Q. 1 (1969) 53

Geer, *Conflicts of Interests and Multiple Defendants in a Criminal Case: Professional Responsibilities of the Defense Attorney*, 62 Minn. L. Rev. 119 (1977) 72

Lowenthal, *Joint Representation in Criminal Cases: A Critical Appraisal*, 64 Va. L. Rev. 939 (1978) 72

Other Authority:

Fed. R. Crim. Pro. 44(c) 77

IN THE

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OCTOBER TERM, 1979

No. 78-1832

JULIUS T. CUYLER, SUPERINTENDENT
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v.

JOHN SULLIVAN,
Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

BRIEF FOR RESPONDENT

STATEMENT

This Court granted certiorari to review the judgment of the Third Circuit which issued a writ of habeas corpus because John Sullivan's Sixth and Fourteenth Amendment rights to effective assistance of counsel were violated in this case, which concerns his conviction of

two capital offenses. The Third Circuit predicated its decision upon actual conflicts of interest and prejudice occasioned by the representation of respondent by two attorneys who also represented two co-defendants.

The Third Circuit's opinion catalogues these prejudicial conflicts of interest and rules that the record does not warrant a finding that this dual representation "raised no possibility of prejudice or conflict of interest, however remote" under the case law of the Circuit. In so doing the Third Circuit reversed both the District Court's denial of the writ, which the United States magistrate had recommended issue, and the rationale of the Pennsylvania Supreme Court that there was no dual representation.[1]

The decision of the Third Circuit was based upon the record evidence at trial in 1967 and post-conviction proceedings in 1975 in the state court which demonstrated a pattern of conflicts beginning with the retention of the two attorneys by the two co-defendants, who offered the services of their attorneys to respondent without fee, and extended to ongoing conflicts in the carrying out of a joint investigation for all three, in mapping strategy for a unified defense, in the joint preparation for trial between and among the three defendants, the two attorneys, and the investigator. The Third Circuit concluded that *both* attorneys represented respondent as well as his two co-defendants, a fact which petitioner herein does not now contest, and that they viewed themselves as a defense "team" for all three defendants. The Court also concluded that independent counsel unburdened by conflicting interests may have chosen and carried out a different trial strategy for respondent, and exampled specific instances of conflict in supporting its conclusion.

[1]Petitioner's allegation that the Third Circuit rested its decision upon a finding of a *potential* conflict is a misstatement, as is petitioner's allegation that the Third Circuit overruled the Pennsylvania Supreme Court's finding that there was no conflict of interest. The Pennsylvania Supreme Court held that the record did not demonstrate dual representation by the two attorneys, and therefore did not resolve the conflict issues upon which respondent herein prevailed in the Third Circuit.

Among these instances is the critical decision to rest the case without presenting respondent's testimony or any other evidence on his behalf; failure to call three exculpatory witnesses who were on the scene at the time the crimes were committed, because the witnesses (according to one of the attorneys' testimony) might have testified they saw either of the other two defendants leaving the scene; and the failure to introduce evidence so as to guard it from premature disclosure as a protective measure for the two co-defendants yet untried. The Third Circuit rested its decision upon still another demonstration of conflict of interest where the truthfulness of the government's star witness could be refuted only by calling a co-defendant to whom the two lawyers owed conflicting duties: 1) protection from possible self-incrimination, 2) premature exposure of defense evidence, as well as 3) a death speech obligation to each individual defendant should a first degree conviction result.

The factual context of this case which resulted in such joint representation by attorneys who embarked upon an advocacy road, burdened by actual and possible conflicts at every turning point, is as follows:

The three defendants, including respondent, were

arrested on November 3, 1966, and each was charged with two counts of murder and conspiracy in connection with the deaths of business agent John Gorey and Rita Janda on June 17, 1966 inside the headquarters of Local 107, Teamsters Union at Broad and Spring Garden Streets in Philadelphia. Respondent John Sullivan also was a business agent for the local. Co-defendant Gregory Carchidi was a janitor also employed by the Union. The inquest into the deaths was scheduled for November 3, 1966, and respondent was among numerous witnesses subpoenaed to testify in that proceeding. He engaged counsel to represent him and it is uncontradicted that this attorney did not represent him beyond November 3, 1966, Mr. Sullivan was arrested at this inquest hearing.

The circumstances of his further encounter with counsel in this case are of sufficient importance to the next thirteen years of Mr. Sullivan's life to warrant some factual attention.

He was held without bail on two murder charges, as were the other two co-defendants Carchidi and DePasquale. After indictment he wanted to engage his former attorney to represent him at trial, but lacked funds. The two other defendants told him they had engaged Mr. Peruto and his "partner" (Mr. DiBona was not then identified by name), and that they would handle the whole case. Respondent agreed to go along.[2]

[2] [By Mrs. Gelb:]

"Q. Thank you. Now I take it then that at no time after November 3, 1966, were you represented by Mr. John Patrick Walsh. Is that a correct statement?
"A. That is correct.
Q. Now did there come a time after that date when you had engaged in other counsel?

footnote continued

footnote continued from preceeding page

A. Yes, ma'am.
Q. Do you have any recollection of when that was?
A. It's sometime in December.
Q. And who are the attorneys that you engaged?"
A. Mr. G. Fred DiBona and A. Charles Peruto."

[By The Court:]

"Now when you say December, you mean 1966?"

[The Witness, John Sullivan:]

"Yes, sir."

[By Mrs. Gelb:]

"Q. And that was apparently subsequent to your indictment. And I may state for the record that the Bills of Indictment indicate that the Bills were returned on November 14, 1966. Taking that as a focal point, Mr. Sullivan, you retained Mr. DiBona and Mr. Peruto subsequent to November 14, 1966; is that correct?
"A. That's correct.
Q. Will you tell the Court the circumstances of your retaining these attorneys to represent you.
A. Yes. Well, as I was arrested with two other fellows, and we discussed the matter, and I had told them that my preference was to hire Mr. Walsh to handle my case. I said the only problem was that I didn't have the money sufficient enough to pay Mr. Walsh. And it was brought out to me by the other two fellows that they had something to do with Mr. Peruto and that Mr. Peruto and his partner, which they didn't name at the time, would handle the case and handle the whole three of us. And I agreed to go along with this.
Q. Did you at any time pay Mr. DiBona or Mr. Peruto to represent you?
A. I did not.
Q. Did you at any time ask them to represent you personally?
A. Well, it was a foregone conclusion after they arrived to visit us at the prison.
Q. Did you make the contact to ask them to come visit you?
A. I did not, no.
Q. To your knowledge did anybody, any member of your family pay any counsel fees to Mr. Peruto or to Mr. DiBona?"
A. Not to my knowledge." *(A. 82a-84a).*

An actual joint representation was established during this pretrial period during which A. Charles Peruto and G. Fred DiBona provided representation for the three defendants. The two attorneys entered their appearances on behalf of their three clients, and thereafter they consulted jointly with them at the prison, adding from time to time an investigator to their team who also consulted jointly. (A. 84a-85a). During the pretrial stage the attorneys made joint court appearances for their three clients (R., Trial, May 11, 1979) and in filing joint motions for discovery of weapons (R., Trial, May 17, 1979). On May 11, 1967, the cases were listed against all three defendant's before Judge Alexander F. Barbieri. After conferring with the attorneys for all three as to whether a joint trial could ensue, the assistant district attorney moved to trial against Sullivan only. (R., Trial, May 11, 1967, 2). As to what extent the conference with counsel informed that decision, the record is silent. The record is explicit, however, that both attorneys objected to the postponing of trial for their other two clients, and demanded on behalf of all three discovery of weapons and testing reports if any existed. (R., Trial, May 11, 1967, 10).

In the three months prior to the call of the Sullivan case to trial, the lawyers for the three defendants represented them jointly. The record is uncontradicted that they mounted a unified defense, employing a single investigator, William Cristine, on behalf of all three. (A. 84a-85a). As to each defendant, the two attorneys owed a duty of protection from possible self-incrimination. As to each defendant, the two attorneys owed an obligation to guard zealously every iota of evidence from premature exposure. As to each defendant, they

owed undivided loyalty and a devotion to maximize any element of surprise which would aid his defense. They confronted tactical decisions of every nature and kind known to trial advocacy in this capital double murder case, and they embarked upon their path presumably knowing the nature and scope of the decisions they would have to make in their travels upon it.

When the case was called, DiBona opened to the jury by announcing he would show that there were a number of people in and about the building where the murders took place, who would discredit the upcoming testimony of the Commonwealth's star witness, McGrath. He said McGrath had given totally conflicting accounts of the events of June 17 to a Union official named Michael Hession. (R., Trial, 90-91).

John Sullivan was also a business agent for the Union. McGrath, a janitor, testified he arrived at the local's office building at about 6:00 P.M. In the course of cleaning the building Mr. Sullivan asked him why he was cleaning on Friday, which was McGrath's day off, and suggested that he defer his cleaning duties. A credit union meeting was about to take place that very evening, and a union meeting was scheduled for Sunday. After John Gorey and Rita Janda arrived in the building, Gorey as well had a conversation with the janitor that related to his cleaning responsibilities. At some time another janitor, who was later to be a co-defendant, Carchidi, also suggested that McGrath

defer his cleaning duties because of the upcoming meetings. While McGrath and Carchidi were talking together, Sullivan left the conference room, and the record reflects that no evidence whatever placed him in that room again, nor was there ever any record evidence that Mr. Sullivan ever entered John Gorey's office. McGrath said he heard what sounded to him like firecrackers going off, and McGrath was permitted to testify over defense objection that he then asked Carchidi "What was that?" and Carchidi replied "Get out of the building and don't say nothing." (R., Trial, 844).

McGrath did in fact leave the building in a hurry. He testified in fulfillment of DiBona's prophecy that he (McGrath) saw three people standing outside under Gorey's window, and he stopped to speak to one of them whom he knew by name, Nicholas Franks. (R., Trial, 839-840). He said someone named John Sheltz and a woman whose name he did not know were outside shortly before. (R., Trial, 812). He agreed that he had told Michael Hession varying accounts of what happened on June 17, and acknowledged Hession was the person to whom he owed his present job. (R., Trial 733, 7470752). McGrath later returned to cover up evidence that he had ever been in the building, then departed again, without looking into or checking any of the rooms.

The bodies of Gorey and Janda were found the next morning in Gorey's second floor office. No eyewitness evidence nor weapons nor any other physical evidence was offered to prove Sullivan had ever been in Gorey's office the evening he and Janda met their deaths.

Despite the fact DiBona had opened his case with a promise to produce three persons who were outside

Gorey's office "window" on June 17, and at the very least intimated he would in addition produce a witness, Michael Hession, who would also contradict McGrath, Peruto rested the defense without putting on evidence. DiBona made the closing argument, once again calling attention to the three "missing" witnesses, thereby inviting the district attorney to argue, as he did, that these witnesses were available to the defense. The jury found respondent guilty of both murder charges on June 18, 1967. (R., Trial, 1170-1171).

Under the Pennsylvania rule requiring bifurcated proceedings, Peruto then argued to the jury against imposition of death penalties, the jury selecting life imprisonment.

The attorneys filed post-verdict motions, meanwhile preparing for the upcoming trials of the two co-defendants. On October 25, 1967, although neither attorney had filed a brief in support of post-verdict motions (R., Trial, October 25, 1967, 2), the motions were argued orally before a three judge court *en banc*. On July 15, 1968 the motions were denied 2-1, with Judge (now President Judge) Bradley voting for the grant of a new trial.

The trial judge pronounced consecutive sentences of life imprisonment on August 9, 1968, and on September 10, 1968 DiBona and Peruto filed notices of appeal to the Supreme Court of Pennsylvania. Following respondent's convictions, the other two co-defendants went to trial and were acquitted.

Respondent was later to argue successfully in post-conviction proceedings that his counsel was appointed to the bench of the Court of Common Pleas of Philadelphia during the pendency of the appeals, and the remaining

attorney, Peruto, testified in post-conviction proceedings he never filed a brief nor argued this case in the Supreme Court of Pennsylvania.[3] It was during this period that respondent filed *pro se* a brief in opposition to that filed by the Commonwealth in the Supreme Court of Pennsylvania, and launched his first *pro se* petition for habeas corpus in the District Court on the theory that his attorney had abandoned him for political aspirations and had failed to brief or argue his cases in the Supreme Court. A second habeas corpus petition was also denied on similar grounds.[4] On December 29, 1971, three and a half years after the appeals were docketed, the Supreme Court of Pennsylvania handed down its plurality opinion, splitting 3-3 on the issue of the sufficiency of the evidence to sustain the verdicts, thereby affirming judgments of sentence of the lower court. A petition for reargument by present counsel, who serves *pro bono*, was filed and was refused. Post-conviction proceedings were undertaken on numerous grounds including the ground of conflicting interests resulting in ineffective assistance of counsel, which is presently before this Court, as well as

[3]Mr. Peruto said in response to this question in post-conviction proceedings: "I never did anything for John Sullivan, which will go down to the day I die, because I, too, felt that it was the worst case in my life of an unfair conviction." (A. 45a).

[4]*United States ex rel. Sullivan v. Rundle*, No. 69-244 (E.D. Pa. June 12, 1969) and *United States ex rel. Sullivan v. Rundle*, No. 69-452 (E.D. Pa., September 17, 1969), *certificate of probable cause denied*, misc. No. 1377 (3rd Cir., December 31, 1969), were dismissed because petitioner's direct appeal was still pending. *United States ex rel. Sullivan v. Johnson*, Civil Action No. 73-1694 (E.D. Pa., September 11, 1973), was dismissed for failure to exhaust state remedies.

the denial of respondent's *Douglas* rights. (*Douglas v. California*, 372 U.S. 353 (1963).) On November 6, 1974, the post-conviction court after numerous hearings granted respondent the right to take a direct appeal to the Supreme Court of Pennsylvania upon a factual determination that Peruto and DiBona rendered ineffective assistance in the appellate process.

The claim of ineffective assistance on appeal was affirmed by the Supreme Court of Pennsylvania, which agreed that the grant of a new appeal was proper. However, the Supreme Court this time split somewhat differently on the issue of the sufficiency of the evidence. Justice (now Chief Justice) Eagan, who had in respondent's first appeal found the evidence insufficient, now noted with four other justices that the same evidence was sufficient, with only Justice Roberts and the late Justice Manderino dissenting. The Supreme Court refused to grant relief on the issue which is before this Court, because it concluded there was no dual representation in the representation of respondent by DiBona and Peruto.

Respondent then filed a petition for writ of habeas corpus, which resulted in a report and recommendations by United States Magistrate Edwin E. Naythons recommending a writ issue on the ground of conflicting loyalties of counsel. The United States District Court overruled the magistrate and denied the writ. An appeal was prosecuted to the Third Circuit and after briefing and argument before Judges Ruggero J. Aldisert and James Hunter, III of the Third Circuit, with District Judge John B. Gerry of New Jersey sitting by designa-

tion, the Third Circuit reversed and remanded in an opinion joined by all three judges. Rehearing *en banc* was denied, the three judges dissenting. Certiorari was granted by this Court.

SUMMARY OF ARGUMENT

I.

The record of respondent's case demonstrates from the initiation of pretrial preparation to the appellate stage, a conflict of interest between respondent and his other two co-defendants, all of whom were jointly represented, said conflicts influencing the judgment of counsel. At no time was any mention of a waiver of any such conflict ever broached by the trial court to either counsel or the respondent.

The Third Circuit made a careful review of the entire record, and concluded, although not necessary to its decision, that respondent's counsel were burdened by several conflicts of interest which resulted in prejudice.

Contrary to petitioner's assertions, the existence of these conflicts was apparent from the initiation of the dual or joint representation, and continued unabated throughout the proceedings against respondent.

Further, these conflicts were fully developed on the record which disclosed: 1) a failure to call exculpatory witnesses at the 1967 trial on behalf of respondent, 2) a conflict between a co-defendant's Fifth Amendment privilege and the right of the respondent to call

witnesses in his own behalf, 3) a strategy at respondent's trial not to prematurely disclose defense evidence for the benefit of the two then untried co-defendants, and 4) an explicit perception of divided loyalties on the part of one trial counsel.

The Commonwealth of Pennsylvania became the illegitimate beneficiary of these conflicting interests, and the Third Circuit properly found that independent trial counsel may well have utilized other strategy.

II.

The standard applied in the Third Circuit to conflicts of interest for Sixth and Fourteenth Amendment purposes is in fundamental agreement with six other circuits. The Third Circuit standard requiring a showing of prejudice or conflict, however remote, is not the equivalent of a rule that joint representation is per se a violation of the Sixth Amendment.

In the case of a silent record, where no waiver of the right to be effectively represented occurred at trial level, the burden of proof should be on the Commonwealth to show that joint representation did not result in a Sixth Amendment violation or was unlikely to do so.

This standard is the framework for appellate review of an asserted claim of Sixth Amendment violation by reason of conflicts where the record is silent as to any intelligent waiver thereof.

The Third Circuit's standard is in essential agreement with the standards employed in the First, Second, Fourth, Seventh and Eighth Circuits. Only the D.C. Circuit may be said to employ a per se rule in the review of conflict of interest cases. Moreover, the result reached by the Third Circuit in the instant case was predicated on facts which would have compelled relief in any circuit, for the conflict was clear, actual and prejudicial. The distinctions urged by the petitioner relate to the language of the standard employed, and not to the facts of the case under scrutiny. Such a semantic distinction cannot be the basis of a conflict among the circuits, where any circuit would have granted the relief found appropriate by the Third Circuit.

III.

State action, for Fourteenth Amendment purposes, is present in this case, as in every criminal case, by the state's imposition of judgment depriving respondent of liberty for the rest of his natural life. The only question arguably remaining is whether the Sixth Amendment standing alone, imposes a requirement of official action as a prerequisite to the type of relief granted by the Third Circuit.

The language of the Amendment itself ["the accused shall enjoy . . . the Assistance of Counsel"] requires an opposite construction. The meaning of the command does not limit itself to deprivations which have an

official component. Additionally, the monopolistic control by the state over the qualifications and discipline of lawyers suggests that official action is always present where the duties of lawyers to clients are concerned.

The distinction between retained and appointed lawyers urged by the petitioners is one which this Court has rejected consistently, most recently in *Ferri v. Ackerman*, ____ U.S. ____ (No. 78-5981, decided December 4, 1979). Official action is implicated in the state's duty to provide for criminal defendants, who have no choice but to participate, a fundamentally fair trial. The court, the prosecution, and the defense all hold the constitutional office which effectuates that guarantee. Retained attorneys, just as court appointed ones, accept that office when they undertake representation of a criminal defendant.

IV.

The Third Circuit made use of the record developed in the state courts, and did not engage in *de novo* fact finding, nor violate the limits of appeallate review. The standards utilized in determining the existence of conflict were necessarily federal standards, which the Third Circuit was under a duty to apply.

The mandate that federal courts study the record independently to determine whether or not state court conclusions are supported therein has been long established. See *Neil v. Biggers*, 409 U.S. 188 (1972); *Townsend v. Sain*, 372 U.S. 293 (1963). This is not the equivalent of fact finding, which was in this case unnecessary in the face of the complete record pre-

sented to the Third Circuit. None of the pertinent facts in that record were disputed in the Third Circuit which appropriately corrected an erroneous ruling concerning federal constitutional law, applying federal law to undisputed facts and drawing the legal conclusion that respondent's attorneys were burdened by conflicts of interest.

V.

The circumstances surrounding respondent's representation demonstrate the hazards occasioned to criminal defendants in cases of joint representation. Although it is not necessary to reach such a conclusion, it is suggested that no standard short of a prophylactic rule against joint representation adequately protects the constitutional right to effective assistance of counsel for citizens charged with a crime.

The courts cannot provide protection by conducting a waiver colloquy at trial level which infringes upon a defendant's Fifth Amendment privilege, against self-incrimination, the attorney-client privilege, and which exposes a defendant to a perjury charge if his response during the colloquy differs from trial testimony. The assertion that such a waiver protects a defendant presumes that he is aware of the right he is foregoing, a doubtful proposition. The *Johnson v. Zerbst*, 304 U.S. 458 (1938) standard of waiver will likely remain unmet.

Even if a waiver is effective, the result may be a fundamentally unfair trial apart from the waiver. Additionally, appellate review of a conflict of interest is incapable of disclosing what does not appear on the

record. Finally, application of ethical standards for the conduct of attorneys in cases of joint representation does not redress the harm done to the client.

The lack of appropriate control over and remedy of conflicts of interest requires the imposition of a ban on joint representation of criminal defendants, who run the risk of the penalty and suffer the consequences that conflicted representation entails.

ARGUMENT

I.

THE THIRD CIRCUIT'S ORDER GRANTING RESPONDENT'S WRIT OF HABEAS CORPUS WAS COMPELLED BY SUBSTANTIAL RECORD EVIDENCE OF ACTUAL CONFLICTS OF INTEREST AND PREJUDICE OCCASIONED BY THE JOINT REPRESENTATION OF RESPONDENT BY TWO ATTORNEYS WHO ALSO REPRESENTED TWO CO-DEFENDANTS.

In *Glasser v. United States*, 315 U.S. 60, (1942), this Court reversed a defendant's conviction because his attorney, while also representing a co-defendant, failed to provide the quality of legal assistance "untrammeled and unimpaired" by conflicts of interest which the Sixth Amendment compels. The conflict asserted by counsel at trial was that his representation of Glasser in his conspiracy trial, while also representing a co-defendant, may lead the jury to link the two unfairly. In holding that the attorney's failure to cross examine a witness whose testimony could inculpate Glasser, this Court credited the biblical aphorism:

> "No man can serve two masters; for either he will hate the one, and love the other; or else he will love the one and despise the other. . . ." Matthew 6:24

Since *Glasser* was decided appellate courts have given expression in varying language to standards for determining whether a conflict of interest was demonstrated, whether the reviewing court has secure grounds for concluding the conflict existed, whether a judge should be required affirmatively to inquire into the defendant's understanding of his right to conflict-free counsel, and what is the appropriate allocation of responsibility as between a judge and an attorney for facilitating "untrammeled and unimpaired" representation consistent with the Sixth and Fourteenth Amendments.

Where unlike the Glasser trial, counsel did not explicitly advise the trial court of the possibility of a conflict, the standard adopted by the Third Circuit for determining the existence of a conflict has been expressed as follows:

> "[R]epresentation of co-defendants by the same attorney is not tantamount to the denial of effective assistance of counsel guaranteed by the Sixth Amendment. There must be some showing of a possible conflict of interest or prejudice, however remote, before a court will find the dual representation constitutionally defective." *Walker v. United States*, 422 F.2d 374 (1970).

Moreover, when John Sullivan was tried on double murder charges arising out of the killing of two persons inside Local 107, Teamsters Union in 1966, he had a

constitutional right to demand of his attorneys not only that they exercise the customary skill and knowledge which commonly prevails in preparing and trying a case, but also that they do so unburdened by dividing their loyalties while meshed in conflicts of interest. *Moore v. United States*, 432 F.2d 730, 736 (1970); *United States ex rel. Green v. Rundle*, 434 F.2d 1112 (1970); *United States ex rel. Hart v. Davenport*, 478 F.2d 203, 210 (3rd Cir. 1973). The Commonwealth of Pennsylvania's case against John Sullivan demonstrates from the initiation of pretrial representation to the appellate stage a consistent pattern of actual conflicts of interest as between respondent and the co-defendants, which influenced the judgments of his counsel. Both attorneys, concededly well known in Philadelphia regrettably gave short shrift to the outsider among the three co-defendants, the one who couldn't pay the bill, the one prejudiced by the guarding of evidence which upon later disclosure benefitted the others. In this case, where the evidence was wholly circumstantial and thin, the conflicts most assuredly tipped the scale in favor of the Commonwealth who became the illegitimate beneficiary of respondent's conflict-laden trial.

The Third Circuit made a careful examination of the entire record and concluded, although not necessary to its decision, that there was conflict of interest and even a showing of prejudice and that independent counsel might have made a difference in defense strategy.[5]

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[5] The Third Circuit correctly held that reasonable strategy engineered by a conflict-laden counsel is insufficient to withstand the plain fact that the conflict itself rendered counsel ineffective.

A. Actual conflict in the representation of the respondent by the lawyers who also represented his co-defendants began long before trial and unconstitutionally affected trial strategy.

As the Third Circuit found, a unified defense was mounted for the three defendants by the two attorneys. Conferences were held jointly among the five at the prison, and on some occasions were attended as well by the sole investigator retained by the two attorneys to investigate the case for their three clients. While the precise defense strategy cannot be reconstructed from the cold record, we can define "tips of icebergs"[6] which yield clues to larger underlying problems. For example, there is no record evidence whatever that Sullivan and DePasquale ever knew each other prior to their arrests. Both Peruto and DiBona during the course of the Sullivan trial made strenuous efforts to disassociate DePasquale from Sullivan. At one juncture for example Peruto argued to the court that the jury should be instructed that DePasquale was not even a co-defendant. (R., Trial 1101). Confidences DePasquale and Carchidi disclosed which required protection during the trial of Sullivan may well have influenced the trial strategy in Sullivan's case. Since Sullivan's defense that he was not in the building at the time the crimes were committed required his testimony to that effect, and he was never called, it is not speculative to suggest that the jury concluded by its verdict that Sullivan was there on the scene. The two attorneys' concern for the co-defendants informed their advice to Sullivan. Respondent had a right to know what a lawyer representing him alone would devise in the way of defense strategy. He had a

[6] *Lollar v. United States*, 376 F.2d 243 (D.C. Cir. 1967).

right to the assurance that his attorneys would exercise appropriate zeal to obtain his acquittal. Protection and guarding of the co-defendants and of evidence is inconsistent with these interests.[7]

No attorney can use the skill commensurate with even normal trial advocacy where actions or advice given to one client may possibly damage other clients or where inaction toward one client may possibly benefit another client. It is in this connection that the potential for conflict becomes the conflict.[8] Counsel for Sullivan owed him a responsibility to produce every iota of testimony and evidence which in their professional judgment would strengthen his defense; unfortunately the conflict lies in the fact that they also owed

[7] Absent a waiver it is difficult to see how the attorney's decision not to produce evidence in respondent's case so as to "save" it for the subsequent trials can ever be termed conflict-free and non-prejudicial. It must be stressed that it is the judgment of the trial attorney that is here burdened by a conflict and whenever such extraneous matters inform an attorney's judgment a prejudicial conflict is in existence.

[8] This is obviously what the Third Circuit held below when it ruled, at 522, "We believe that Peruto's testimony illustrates in the plainest possible terms the potential for conflict of interest." There is no way to read this portion of the opinion except that it must mean the potential that respondent's interests were inconsistent with those of Peruto's other two clients. It cannot mean that potentially Peruto's judgment was affected since it is uncontradicted and unchallenged in the Third Circuit that Peruto's judgment was *actually* affected due to the context of this case, where, as found by the Third Circuit, Peruto, if faithful to all three of his clients, would necessarily have to consider the "possibility" that actions or advice to one would or could injure others, or that inaction as to one could benefit others.

obligations to Carchidi and DePasquale at this same juncture not to tip their hand to the Commonwealth.

The very nature of trial advocacy is such that activity vital to trial must of necessity take place prior to trial. An investigation must be carried out; privileged conferences between lawyer and client must take place; legal advice is offered and discussed; trial strategy is charted. The right to counsel entails untrammeled and unimpaired assistance prior to trial, as well as in the course of trial. *Glasser v. United States, supra*, at 465; *United States ex rel. Hart v. Davenport, supra*, at 209; *Von Moltke v. Gillis*, 322 U.S. 708, 68 S.Ct. 316, 92 L.Ed. 309 (1949); *Porter v. United States*, 298 F.2d 461, 464 (5th Cir. 1962).

B. Trial strategy reveals ongoing divided loyalties and failure to put on a defense in the face of respondent's request to call witnesses known to all parties whose testimony was directly relevant to the defense.

McGrath, the Commonwealth's chief witness testified he heard "firecrackers" at about 7:15 P.M. and left the union hall in a hurry Since he had already testified that upon removing some trash he had seen and spoken to two people in the parking lot nearby,[9] his departure following

[9] "Q. Now, you went back to a parking lot or a lot to burn some trash, it that right?

"A. I normally take the cans in the lot adjacent to the union hall and empty the can and burned it. Most of the time, I set them on fire.

Q. Well, now, specifically this night of June 17, you went down to a lot behind the 107, burned the trash or got rid of the trash somehow, is that right?

footnote continued

the "firecrackers" was not too hurried to prevent his observing three additional persons and his conversing with one of them about money owed him and about a flat tire.[9a]

The heart of Sullivan's defense was that he did not kill Gorey and Janda, nor was he seen inside the building at the time the shots ("firecrackers") were fired. Mr. DiBona told the jury when he opened for Sullivan that he would show there were three witnesses nearby who did not hear shots when McGrath said they rang out. McGrath's subsequent testimony placing numerous witnesses in a position to hear what McGrath said he heard was directly relevant to Sullivan's defense that the noises did not occur when he was in the union

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A. That is right.

Q. And while you were down there, you had a conversation with someone, didn't you?

A. Well, not a conversation, Just a wave of the hand, and how you doing, or . . . I was that close to talking to one, John Sheltz.

Q. And whe else was there?

A. There was a woman there who owned this car. I don't know her. I know Johnnie Sheltz. He was one of my former stewards.

Q. And then you went back upstairs; is that correct?

A. Yes, sir.

Q. By the way, do you know that woman's name?"

A. No, I don't." (R. Trial, 811-812).

[9a] Contrary to petitioner's contention that no defense evidence which had any bearing upon guilt in fact existed (Pet.'s Brief, 20), the record demonstrates that the testimony of six witnesses (including respondent himself, Carchidi, Hession, and the three others present outside the victim's window), was available. Except for the defendants, the witnesses were under Commonwealth subpoena awaiting the crier's call to the witness stand. (R. Trial, 849-850; R. Trial, 1126-1127).

hall.[10] Indeed DiBona advanced this theory in closing argument as well. He said:

> "... All you have is the testimony of McGrath; that he heard firecrackers; that he heard what he thought were firecrackers at 7:15 P.M. You remember, members of the jury, that I pointed out on cross examination with Mr. Levy that three men were immediately in front of Gorey's office, not more than 9 or 10 feet from the office. McGrath is over at this end of the conference room (indicating) and if you make the measurements that I have, it's 75 or 80 feet. If McGrath hears these firecrackers from here, (indicating), is

[10] [By Mr. DiBona:]

"Q. We will leave that then, Mr. McGrath. Then you started driving east on Spring Garden; is that correct?

"A. After I come down the steps, I got in my car, went east on Spring Garden.

Q. And then you passed the three people standing on the sidewalk in front of the building; is that correct?

A. Well, I didn't actually pass them. I seen them standing on the side of the building, somewhere in the vicinity of Gorey's office. I mean, I wouldn't say they were standing right under the window. There were three people there. Two of them I knew and the other one I didn't.

Q. Did you have a conversation with one of them?

A. One of them I had a conversation with him.

Q. You testified yesterday that you had a conversation with ... sir, repeat the conversation

A. The conversation I had with Nicholas Franks pertained to stopping at Local 513 to pick up an envelope. I had loaned him some sound equipment that he used in an election, that he had there that had passed and he wanted to compensate me for it.

Q. That is all the conversation you had?"

A. Other than that, he informed me that I had a flat tire." (R. Trial, 849-850).

> there any doubt in anyone's mind that the three men standing outside of Gorey's window 9 or 10 feet away, did not hear it? Certainly, members of the jury, you must conclude that there is no doubt about it if such things did occur. Now, as to Martin and Frank and Ted, why did the Commonwealth not produce these three men? I suggest, members of the jury, his Honor will charge you of his failure to produce these three men. Is it that the Commonwealth knew that it would not be supporting testimony? You heard McGrath say that when he drove east on Spring Garden, he stopped and talked to these three men. If these noises had occurred at 7:15, would you not expect that the three men outside of the building would ask McGrath what were the noises, they did not. McGrath came out of the parking lot after leaving the building, and did he ask them what were the noises, no. They are talking about a flat tire and a lot of other matters, but there is no mention of the so-called noises. We submit, members of the jury, that *this noise did not occur at that hour.*" (R., Trial 1170-1171), (emphasis supplied.)

Of course Mr. Sullivan's two attorneys had already rested the case without putting on evidence. The record reflects the fact that the Commonwealth had these witnesses under subpoena. The assistant district attorney as well as both defense counsel knew who the witnesses were.

> "MR. PERUTO: Prior to Your Honor making a ruling, the Commonwealth had rested. Mr. Sprague had witnesses who were within ten feet of the place where the shooting is alleged to have happened. He saw people that could have been eye-witnesses and they were not called in here to testify. The Commonwealth has not called them. I ask that they be made available or have it put on

the record as to when the district attorney will have them available.

"THE COURT: I don't know who they are.

MR. PERUTO: Those three people."

THE COURT: Do you know who they are?"

"MR. SPRAGUE: *They are the people here under subpoena. Mr. Peruto knows that they were here.* They were here during the presentation and released to stand by for a phone call. The defense, as I stated yesterday, can subpoena whoever they want to come in and testify." (R. 1126-1127), emphasis supplied.

What interest of John Sullivan's was effectuated by a defense decision not to call these witnesses to refute McGrath? Defense counsel told the jury in opening and closing speeches of the presence of these persons. The assistant district attorney was invited by the defense to comment on failure to put on a defense, in particular to call these witnesses, and he did so. The trial judge even approved the assistant district attorney's speech to the jury in which he argued *these very witnesses were in the hallway available to the defense.*[11]

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[11]"THE COURT: My ruling is that you have a right to say that the witnesses are available, these witnesses that you have mentioned within your speech that you have failed to call." (R. Trial, 1184).

. . .

"MR. SPRAGUE: Now, members of the jury, before I was interrupted, I was stating and I repeat again, that these witnesses defense is talking about are right out there in the hallway, available to them. Members of the jury, when McGrath was on the stand and the defense said to him, 'Did you say that was the same story that you have to Michael Hession,' I don't know how many times this was asked over and over, but McGrath said that, 'sure, I did.' Hession was available to them and don't you think if they had anything contradictory wise to what McGrath said that they would have called him. . . ." (R. Trial, 1185).

At post-conviction proceedings Mr. Sullivan testified he heard his attorney tell the jury that three witnesses were under the window of Gorey's office at the time the shots were fired, and he wished to have these witnesses testify. (A., 103a-104a). He was told by counsel:

"They said there is no sense in putting anything on that may hurt the other two (co-defendants) because we've got this case won." (A. 106a).

Mr. Peruto's account is in agreement with Mr. Sullivan's; Mr. Peruto testified:

"Q. You had an investigator by the name of Bill Cristine investigate this case for you?

"A. Yes.

Q. Do you remember him submitting a report to you saying there were three witnesses outside the Local 107 Headquarters who did not hear any shots?

A. Yes.

Q. Did you advise the defendant Sullivan when you were considering whether or not to put on a defense that these three witnesses were available and could help this defense?

A. I don't recall advising him of that, but I do recall that I felt that it might be dangerous because *one of the other two defendants leaving in a hurry might have been seen by those three witnesses and it might have damaged that defendant and it might have come out on the cross-examination of those witnesses in Sullivan's case.*

Q. So it might have hurt one of the other defendants that you represented?"

A. Yes, sir. And there was a matter of judgment in the sense that we felt that the only thing that they had was the mere statement of McGrath and that the case would not even go to the jury." (A. 63a-64a), (emphasis supplied.)

Judge DiBona testified there was no "real good evidence" the defense had (aside from respondent's testimony, about which more will be noted). (A. 22a). However, his recollection is at variance with the trial record, which demonstrates that at the close of the Commonwealth's case he asked the assistant district attorney to have these witnesses under subpoena to remain subject to call. He said:

> "... nor do we know that they would not call witnesses to the witness stand *including people whose testimony would have appeared to have been vital to the Commonwealth's case*, but apparently adverse to their position, including three people who were standing there at the time these firecrackers went off." (R., Trial 1085), (emphasis supplied.)

Respondent was advised by his two lawyers that three witnesses who were under the Commonwealth of Pennsylvania's subpoenas during the course of his trial would refute McGrath's testimony that the lethal shots were fired at 7:15 P.M. He expected these witnesses to be called on his behalf.[11a] The trial record fully

[11a]Petitioner informs this Court in a footnote that the three witnesses *not* called at trial may very well have identified respondent then. (Pet.'s brief at page 11, footnote 10). Absolutely nothing supports this speculation, and every inference that can be drawn from the record refutes it. No prior statements or physical descriptions of any of the three witnesses were introduced at the state post conviction hearing, no mention was made of any of their testimony at the other trials and no recollection was offered by any prosecutor. The plain fact is that the sufficiency of the evidence question in this case haunted the Pennsylvania Supreme Court which affirmed by a 3-3 vote the 2-1 decision of the state trial court *en banc* on sufficiency of the evidence. Had any of these three witnesses had anything helpful to the prosecution it would have been proffered at the 1967 trial.

supports his expectation in that both of his lawyers repeatedly stated that these witnesses were available to discredit McGrath. Their testimony was characterized as vital. (R., Trial 1085).

One of the lawyers testifying at post-conviction proceedings has supplied the answer to the question why they were not called.

> "I ... recall that I felt it might be dangerous because one of the other two defendants leaving in a hurry might have been seen by those three witnesses and it might have damaged that defendant and it might have come out on the cross examination of those witnesses in Sullivan's case." (A. 63a).

Both attorneys were in actual conflict as between the representation of Sullivan whose case they were then trying and their ongoing representation of Carchidi and DePasquale, which in fact later resulted in acquittal for both. The attorneys' responsibilities to Sullivan were shackled by responsibilities owed their other two clients.

In *Holloway v. Arkansas*, 435 U.S. 371, 98 S.Ct. 1173 (1978), this Court gave recognition to the grave difficulty an appellate reviewing court may encounter in seeking to identify from a cold dispassionate transcript consequences of a lawyer's failure to perform certain trial tasks. The Chief Justice said:

> "... [I]n a case of joint representation of conflicting interests the evil—it bears repeating—is in what the advocate finds himself compelled to *refrain* from doing, not only at trial but also as to possible pretrial plea negotiations and in the sentencing process. It may be possible in some cases to identify from the record the prejudice

resulting from an attorney's failure to undertake certain tasks, but even with the record of the sentencing hearing available it would be difficult to judge intelligently the impact of a conflict on the attorney's representation of a client. And to assess the impact of a conflict of interests on the attorney's options, tactics, and decisions in plea negotiations would be virtually impossible. Thus, an inquiry into a claim of harmless error would require here unlike most cases, unguided speculation." *Holloway v. Arkansas, supra* at 1182, emphasis in original.

In this capital case where the evidence supporting the convictions was scant, failure to call witnesses to rebut the Commonwealth's contention that respondent was present when the crimes were committed is a roll of loaded dice. That the windfall beneficiary of this conflict was the Commonwealth of Pennsylvania cannot be disputed. The clear fact is that respondent's lawyers found themselves refraining from calling witnesses, including the defendant, due to an actual conflict.[12]

[12]Such a conflict of loyalties would be given short shrift by a civil court. Judge, later Justice Cardozo's classic statement for the New York Court of Appeals in *Meinhard v. Salmon*, 249 N.Y. 458, 164 N.E. 545 (1928) is still regarded as its benchmark:

"Joint adventurers, like co-partners, owe to one another, while the enterprise continues, the duty of the finest loyalty. Many forms of conduct permissible in a workaday world for those acting at arm's length, are forbidden to those bound by fiduciary ties. A trustee is held to something stricter than the morals of the market place. Not honesty alone, but the punctilio of an honor the most sensitive, is then the standard of behavior. As to this there has developed a tradition that is unbending and inveterate. Uncompromising rigidity has been the attitude of courts of equity when petitioned to undermine the rule of undivided loyalty by the 'disintegrating erosion' of particular

footnote continued

The Third Circuit held that it could find no basis on which to reject Peruto's sworn admission that he injected improper considerations into the attorney-client relationship. (*United States ex rel. Sullivan v. Cuyler*, 593 F.2d 512, 522 (1979). The Court wrote:

"We believe this analysis is seriously flawed. It is undisputed that Peruto participated in the decision not to present a defense. He advised petitioner not to testify and suggest to co-counsel that witnesses not be called. No reason or evidence is offered to explain why an attorney would make the damaging admission of professional impropriety we have

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exceptions. . . . Only thus has the level of conduct for fiduciaries been kept at a level of conduct for fiduciaries been kept at a level higher than that trodden by the crowd: It will not consciously be lowered by any judgment of this court."

Again, speaking for the New York Court of Appeals, Judge Cardozo stressed the trustee's duties which respondent herein asserts should equally apply to counsel in a capital case:

"But 'the great rule law' which holds a trustee to the duty of constant and unqualified fidelity, is not a thing of form and phrases. A dominating influence may be exerted in other ways than by a vote . . . A beneficiary about to plunge into a ruinous course of dealing, may be betrayed by silence as well as by the spoken word. The trustee is free to stand aloof, while others act if all is equitable and fair. He cannot rid himself of the duty to warn and to denounce, if there is improvidence or oppression, either apparent on the surface, or lurking beneath the surface, but visible to his practiced eye. . . ."

There was an influence here, dominating perhaps, and surely potent and persuasive, which was exerted by Mr. Maynard from the beginning to the end . . ."

"There was, then, a relation of trust reposed, of influence exerted, of superior knowledge on the one side and legitimate dependence on the other. . . ." [Cite to Globe Woolen Co. v. Utica Gas Electric Co., 224 N.Y. 483, 121 N.E. 378 (1918)]

quoted were it not true. And Sullivan (albeit not a disinterested witness), corroborates his testimony. We have no basis on which to reject Peruto's sworn admission that he injected improper considerations into the attorney client relationship."

This Court posits testimony or information received from an attorney concerning conflicting interests in the following light:

"When a considered representation regarding a conflict in clients' interests come from an officer of the court, it should be given the weight commensurate with the grave penalties risked for misrepresentation." *Holloway v Arkansas, supra*, at 1180.

The testimony of another witness was anticipated by the defense. Michael Hession, a business agent, as was John Sullivan, had hired McGrath, and apparently had been McGrath's confidant on the evening of June 17 when McGrath went to him. Hession testified at the coronor's inquest on November 3, 1966 that McGrath told him on two different occasions his versions of what had happened on June 17.

Each of these two accounts differed materially from the one he gave at Sullivan's trial. In particular, in one of the accounts he said that he wasn't in the union hall when the "firecrackers" exploded.

Hession was under subpoena to the Commonwealth during the course of respondent's trial, a fact well known to both DiBona and Peruto. Counsel's failure to call Hession to contradict McGrath's evidence at trial is inexplicable. He was deceased at the time of the post-conviction proceedings, and the record reflects the fact that Hession testified at both the coronor's inquest and at co-defendant Carchidi's trial, but was not called

for respondent's trial. Carchidi's trial followed that of respondent by six months.

Hession's testimony was important for an additional reason. Hession knew respondent's hours of employment at the Union, and was required to be present in the union hall on numerous occasions during the evening hours with respondent. This evidence would have negated the Commonwealth's contention that there was something unusual in respondent's presence in the union hall on the evening in question at his trial. (R., Trial 90-92).

Of considerable significance to the outcome of respondent's trial was the fact that the attorney's who represented him owed a duty to Carchidi and the third co-defendant, DePasquale to advise them of their rights against self-incrimination. These obligations to the two co-defendants were ongoing while respondent's case was being prepared and tried. Even before the Commonwealth had completed its case, the trial record reflects the fact that Peruto advised the court that he would not call Carchidi because of his right to remain silent.

"Your Honor, as to working hours, the exact working hours of McGrath, were the same working hours of Carchidi, since they both had the same job.

"THE COURT: There is no evidence as to what Carchidi does.

MR. PERUTO: He is a janitor.

THE COURT: There is no proof.

MR. PERUTO: Your Honor, the fact that he was there after working hours, there is no evidence to support that statement.

THE COURT: Why are two janitors in one room?

MR. PERUTO: Perhaps that's where they were working.

THE COURT: Is that an explanation?

MR. PERUTO: You put me in this position; a statement by Carchidi offered into evidence and can only be refuted by Carchidi.

THE COURT: That is the law because a defendant refuses to testify he can't offer something."

MR. PERUTO: *The defendant can testify, but how can he testify to what Carchidi said, and you can't put Carchidi on the record.*" (R., Trial 670-671), (emphasis supplied.)

Petitioner's argument that the likelihood is great that Carchidi would have declined to testify at trial as an outgrowth of his earlier exercise of his right to remain silent at the coronor's inquest is misplaced. The issue is not whether Carchidi would testify. The issue is what advice did he receive from the same attorney or attorneys who represented respondent Sullivan which informed his judgment and decision. *United States v. Dolan*, 570 F.2d 1177 (3rd Cir. 1978); *United States v. Garafola*, 428 F. Supp. 620, (JD. N.J. 1977).

It is counsel's conflict, not Carchidi's, which requires examination. Since it is beyond question that the attorneys owed Carchidi undivided loyalty and unqualified fidelity, the possibility that his testimony in Sullivan's trial might have been detrimental to him posits nothing less than an actual conflict of interest. Similarly, the possibility that withholding Carchidi's testimony from Sullivan's trial would have been detrimental to Sullivan posits an actual conflict. In this sense the possibilities of conflict *are* conflicts.

If Carchidi could have been prejudiced if he were to

testify in Sullivan's trial, independent counsel should have made that judgment.[13] Speculation that he would or would not have waived his rights plays games with the degree of prejudice Sullivan suffered. Such fine lines have no application to the basic and fundamental rights to fair trial and due process which counsel undermined here. *Glasser v. United States, supra; Holloway v. Arkansas, supra; Castillo v. Estelle*, 504 F.2d 1243 (5th Cir. 1974).

That independent counsel may have been able to obtain the testimony of Carchidi and/or DePasquale is undisputed. Such a decision of necessity had to be made before trial. The testimony of Carchidi at post-conviction proceedings that he would in fact have testified for Sullivan is of some importance not because under any standard a finding of actual prejudice is required, but because his attorneys—the same attorneys who represented Sullivan—had already made the decision to protect him from testifying. Counsel's decision was a *fait accompli* before the Commonwealth had rested and is undisputed proof of actual conflict and prejudice in the representation of these three defendants. Once again the beneficiary of such conflict was the prosecution.

In this trial in which the Commonwealth proceeded upon the murder bills of indictment, the district attorney sought and obtained instructions to the jury on conspiracy to commit the murders, and in the

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[13]See *Commonwealth v. Pass*, referred to in *Armbrister: Act of Vengeance*, 303, where the same prosecutor involved in this case faced co-defendant Tony Boyle as a defense witness prior to Boyle's trial. 468 Pa. 36, 306 A.2d 167 (1976).

course of the trial almost anything which could prove even the slightest concert of action was worked over carefully to encompass respondent.[14] The decisions whether to present a unified defense, thereby stonewalling the conspiracy elements of these crimes, were made by the attorneys who represented all three of the defendants. Conflicts again overlie independent judgment. *Glasser v. United States, supra.*

The issue of whether to put on a defense and/or call the respondent to testify at trial was discussed. As stated by the Third Circuit in this case, *United States ex rel. Sullivan v. Cuyler, supra* at 519:

> "After the Commonwealth had completed its proofs, petitioner and counsel had a lengthy private conference on defense strategy, at which Peruto advised petitioner not to testify and not to present witnesses in his defense; this course was eventually chosen."

Later, the Third Circuit at page 523 was to hold that the fact that Sullivan followed "the course suggested by counsel" [in not taking stand] "... creates the possibility of prejudice."

It is not hard to find the evidence of record that led the Third Circuit to that inescapable conclusion, for Peruto testified:

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[14]See for example the testimony of McGrath that Sullivan suggested he defer his cleaning until after the union meeting, which was later suggested by Carchidi as well. The Commonwealth argued heatedly for proof of conspiracy between Sullivan and Carchidi, completely overlooking the record evidence that the victim Gorey himself had had a similar conversation with McGrath, when in fact McGrath had been derelict in his janitorial responsibilities. (R. Trial, 831-832).

"Q. Well, at any rate you had made a decision not at present any testimony anyway, hadn't you?

"A. In the Sullivan trial?

Q. The Sullivan case, yes.

A. Yes. I can recall the great discussions that we had with Sullivan where we were so convinced that—and we communicated this to Sullivan—

THE COURT:

"When you say great discussion you mean lengthy discussion?"

THE WITNESS:

A. Lengthy discussion, yes, sir. Where we felt that he couldn't possibly be convicted and, therefore, what's the sense in exposing the defense because we had two more defendants to try.

Q. Wait—

A. And I'm afraid Sullivan suffered by that fact.

Q. Wait just a minute, sir. You were concerned with the other two defendants you represented; is that correct?

A. Yes. Why expose your defense if you've got two more people to come to trial and the Commonwealth has not presented a case?

Q. So that entered into your consideration as to whether or not you presented a defense in the Sullivan case?"

A. Sure, it did. When we're talking about back and forth. For example, I've heard Judge DiBona testify today, and, yes, we were sort of playing devil's advocate. I didn't want the defense to go on because I thought we would only be exposing the defendant witnesses for the other two trials that were coming up. Now on the other hand, you see, the three defendants had already decided

between themselves which of us they wanted to be chief counsel. John Sullivan picked Fred DiBona, the other two defendants picked me. So certainly I had to be chief counsel and face the trial of the other two men. And as I look back on that, although it was not my thought that John Sullivan should be short-changed in any fashion, I'm afraid that it was my thought that I was over-solicitous for the other two defendants being ready to be tried." (A. 56a-58a).

Sullivan testified at post-conviction proceedings that he intended to testify on his own behalf,[15] that he repeatedly communicated this wish to his two attorneys, that his attorneys' advice was one attorney advocating taking the stand, and the other advocating silence. Peruto advocated silence.

Carchidi testified at post-conviction proceedings that he was present during a joint conference between and among the attorneys and the defendants when Sullivan "fought like hell to testify." (A. 198a).

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[15]"Q. Now you indicate that you wanted to testify.
"A. Yes, sir.
Q. Did Mr. Peruto want you to testify?
A. No, sir.
Q. And did Mr. DiBona want you to testify?
A. In the beginning he did, yes, sir.
Q. And who made the final decision? Which of the three of you?
A. I had nothing to do with the decision. It was given to me point blank. And Mr. Peruto, after like I say hours of discussion, Mr. Peruto said something to the effect of, 'Look, we're the attorneys. You don't know anything about law.'–I'm not quoting him verbatim, I'm using my own language–and 'your life is in my hands and we're out to protect you, and you're not to worry, that you'll be acquitted and we're assured that you'll be acquitted.' And I said 'Look, you got the ball, carry it.'" (A. 138a).

Mr. Peruto's recollection of how the decision was made was explicated at post-conviction proceedings as well. He said that he felt Sullivan should testify simply because in his opinion it was difficult to get a man acquitted where the jury does not hear from him. (A. 58a). He further said:

BY MR. LUNKENHEIMER (assistant district attorney):

"Do you recall whether John Sullivan said he did not want to take the stand?

"A. It seems to me–

Q. Do you recall one way or the other?

THE COURT:

"Let him answer it."

THE WITNESS:

A. The way I recall it my recollection seems to be that John Sullivan did want to testify because he kept saying over and over 'I didn't do nothing. I got nothing to hide.' Now whether he changed his mind or didn't testify because of what was said to him about the pitfalls of 'Look John'–words to the effect–'Look John, even though you have nothing to hide, Sprague, you're playing in his ballgame, in his yard, and he can make you look bad on these relationships with other women.', and things like that. And that may have been the deciding factor. I don't know. But my recollection seems to be that Sullivan did want to testify in the sense that he felt he had nothing to hide." (A. 70a-71a).

It thus appears that under any version of the facts Mr. Sullivan was given conflicting advice by his two attorneys even in the presence of a co-defendant to whom they owed an ongoing professional obligation.

The Third Circuit's order granting habeas corpus relief on grounds of conflicts of interest and prejudice in respondent's representation by two attorneys who also represented co-defendants finds abundant support in the record. The record in point of fact demonstrates unusually the objective repercussions which are grounded in the conflicts. Respondent's trial was simply a fact-finding process whose delicate balance was infected beginning to end by representation afforded by attorneys whose loyalties were divided. Guilt or innocence hung in the balance when critical decisions whether to call witnesses, including respondent, were filtered through the eye of the co-defendants' needle. It was a capital case.

This Court, it is respectfully suggested, improvidently granted certiorari in this case where the conflicts are abundantly clear and the Sixth and Fourteenth Amendment violations so flagrant. The judgment of the Third Circuit should be affirmed.

II.

THE THIRD CIRCUIT STANDARD THAT A POSSIBILITY OF PREJUDICE OR CONFLICT OF INTEREST, HOWEVER REMOTE, IN THE JOINT REPRESENTATION OF TWO OR MORE DEFENDANTS BY A SINGLE ATTORNEY COMPELS REVERSAL IS IN FUNDAMENTAL AGREEMENT WITH THAT OF SIX OTHER CIRCUITS, AND IN ANY EVENT CERTIORARI WAS IMPROVIDENTLY GRANTED IN THE INSTANT CASE IF THOUGHT TO BE EMBLEMATIC OF A DISAGREEMENT AMONG THE CIRCUITS.

The Third Circuit standard is not the equivalent of the conclusion that joint representation is presumptively violative of the Sixth Amendment as petitioner asserts. To the contrary, the standard requires a showing of "prejudice or conflict of interest, however remote." *Walker v. United States, supra.* This Court has no issue before it which compels it to consider whether joint representation is per se unconstitutional.

The extent of the record conflicts before the Third Circuit in the case *sub judice* resulted in its conclusion that reversal was compelled The specific recitation by the circuit court of the evidence underlying these conclusions is so ample that the Commonwealth of Pennsylvania's argument regarding *possible* conflict is inappropriate. The conflicts were not remote but actual. Upon a conclusion that there was in fact joint representation and conflict, no additional components of Sixth Amendment violation are required. Nevertheless respondent's position, which needs no buttressing, is nonetheless buttressed by the fact that he was not advised by the court or by counsel of the perils of joint representation.

In 1942 the *Glasser* Court articulated an obligation resting upon the trial judge to protect the fundamental rights of the accused including his right to effective counsel. Irrespective of a conflict of interest, the additional burden of representing another party may conceivably impair an attorney's effectiveness. It is for this reason that this Court in *Glasser* imposed a

Johnson v. Zerbst duty to determine on the record whether the accused understood his effective, conflict-free assistance of counsel rights, and whether he waived them.

The record of respondent's case is silent on this issue and no inquiry related to waiver was made by the trial judge. A judge even in 1967 should have made an effort to see to it that the basic and fundamental rights quaranteed by the Sixth and Fourteenth Amendments were not undermined or lost without respondent's knowledge or consent. An inquiry by the court may have disclosed to John Sullivan the perils of joint representation. If then he decided to give up his rights to be separately represented, the record would demonstrate an informed waiver. Contrary to its position here, it is the Commonwealth upon whom a heavy burden of proof should rest (where joint representation and a silent record for waiver purposes coincide) to establish that respondent was not prejudiced by the joint representation. *Kaplan v. Bombard,* 573 F.2d 708 (2nd Cir. 1978, Mansfield, J., concurring); *Colon v. Fogg,* 602 F.2d 403 (2nd Cir. 1978).

The trial judge should have known respondent's two attorneys were burdened by conflicting loyalties. They filed appearances for all three defendants, they appeared pretrial before the judge and filed motions on behalf of all three defendants, they informed the trial judge they could not call Carchidi to testify for Sullivan, and they asked the judge to tell the jury DePasquale was not even a co-defendant. (R., Trial, 1107-1108). The trial judge at one juncture told the attorneys he was tired of their trying to get discovery

for the other defendants. (R., Trial 1002). The judge knew or should have known Sullivan's attorneys were troubled by conflict, and his obligation to ascertain whether Sullivan was so informed is simply a corollary of Sixth Amendment effectiveness. *Colon v. Fogg, supra,* 407.

In examing the record for a Sixth Amendment violation, one of the most significant inquiries is the presence or absence of a waiver of separate representation. This is so in most circuits. In *United States ex rel. Hart v. Davenport, supra,* the Third Circuit expressed the admonition that the dangers inherent in joint representation are serious enough to warrant a warning to the accused at the earliest stage of the criminal justice process of the perils of joint representation. He may then make an informed choice whether to waive his right "to the unfettered representation made possible by separate counsel." See also *Government of the Virgin Islands v. Hernandez,* 476 F.2d 791 (3rd Cir. 1972).

The admonition in the *Hart-Davenport* case which has since been referred to as the *Davenport* inquiry in the Third Circuit, has not been considered a mandate in which reversal will automatically be ordered as in the District of Columbia Circuit, *Campbell v. United States,* 352 F.2d 359, (D.C. Cir. 1965). Nonetheless the *Davenport* inquiry is the equivalent of the requirement imposed in five other circuits excluding the District of Columbia Circuit. For example, the First Circuit in 1972 mandated an inquiry by the court of jointly represented defendants to determine a potential conflict. If such an inquiry is not conducted, the government has the burden of demonstrating the unlikelihood of prejudice by a

preponderance of the evidence.[16] *United States v. Foster*, 469 F.2d 1 (1st Cir. 1972). Nonetheless in *United States v. Donahue*, 560 F.2d 1039, 1045 (1st Cir. 1977) the court reversed because the government failed to establish "the improbability of prejudice" and made the further observation that alternative strategy required exploration for "potential for conflict of interest."

In the Second Circuit a waiver colloquy is mandated in joint representation cases. *United States v. DeBerry*, 487 F.2d 448 (2nd Cir. 1973). Even if the court finds an effective waiver of separate representation, however, a defense of Sixth Amendment violation can be shown if actual prejudice is demonstrated. *Kaplan v. Bombard, supra.* In *United States v. Carrigan*, 543 F.2d 1053 (2nd Cir. 1976), for example, the court found actual conflict of interest prejudiced a defendant who had executed a valid waiver, where the government had not established lack of prejudice.

In the Fourth Circuit also a waiver is suggested and if waiver is demonstrated a defendant must then show in order to prove a Sixth Amendment claim "some specific instance of prejudice, some real conflict of interest." *United States v. Atkinson*, 565 F.2d 1283, 1284 (4th Cir 1977, cert denied, 436 U.S. 944 (1978). In *Sawyer v. Brough*, 358 F.2d 70 (4th Cir. 1966) the court held the "possibility of harm" sufficient to render a

[16]The case *sub judice* is a silent record case concerning any waiver of conflicts. Because of this fact, the Third Circuit's opinion can be very simply explained on the clear basis that the Commonwealth failed to meet its burden of proof requiring it to establish the unlikelihood of prejudice with the Third Circuit ruling that respondent had established a very real possibility or potential of prejudice by having established actual conflicts.

conviction invalid, and in *United States v. Truglio*, 493 F.2d 574 (4th Cir. 1974) the possibility of a conflict of interest or prejudice citing to *Walker v. United States, supra*, in the Third Circuit, was the rule of the court.

In the Seventh Circuit, however, the responsibility for avoiding conflicts situations rests with the bar rather than with the court, and a Sixth Amendment violation on conflicts grounds can be made out by demonstrating "with a reasonable degree of specificity that a conflict of interests actually existed at trial." *United States v. Mandell*, 525 F.2d 677 (7th Cir. 1975), cert. denied, 423 U.S. 1049, (1976).

In *Austin v. Erickson*, 477 F.2d 620 (8th Cir. 1973), the Eighth Circuit reversed and remanded on its finding of "an actual conflict of interest" or "a substantial possibility of a conflict" coupled with a silent record as to waiver. In so doing it cited to a Pennsylvania Supreme Court case which set the standard in Pennsylvania, *Commonwealth ex. rel. Whitling v. Russell*, 406 Pa. 45, 170 A.2d 641 (1962). The Eighth Circuit in *Beran v. United States*, 580 F.2d 324 (8th Cir. 1978, cert. denied, 99 S.Ct. 1422, 1979) held that the conflicts evidence need only be minimal.

To recapitulate, even in the cases where a valid waiver of the right to separate representation can be demonstrated of record a defendant nonetheless can successfully raise the claim of ineffective assistance by showing conflict and/or prejudice. It is in the standard for determining the allocation or responsibilities as between the trial judge and the attorney, and the effect of such a determination upon a subsequent claim of

conflict, that divides the circuits. The coincidence of joint representation, a silent record as to waiver, and conflicting interests as posited by this case, would require reversal on Sixth Amendment grounds in any circuit.

Petitioner's assertion that the record in the case *sub judice* does not support a finding of actual conflict is simply frivolous. The factual contents of the conflicts have been explicated in the Statement and in Argument I. The nature of the conflicts which the Third Circuit held required reversal when viewed from the standard point of the lawyer whose judgment is scrutinized is no less real than John Sullivan's sentences of consecutive life terms. The Commonwealth of Pennsylvania misreads both *Glasser* and *Holloway* in its argument that a defendant who has suffered convictions by reason of conflicts of counsel must bear a heavy burden before he can be successful in overturning the conviction.

Both *Glasser* and *Holloway* granted relief because the lawyers were aware of the inconsistent interests of their clients. This awareness is distinguished from an after the fact reconstruction of objective facts which leaves room for guess work and speculation. There is nothing speculative or unreal about counsels' exercise of judgment. Peruto said his advice to Sullivan was actually given because he perceived conflicting loyalties to all three defendants he represented. DiBona concedes only that decisions were made jointly between and among himself, his co-counsel, and his client, but he most assuredly represented the other two defendants, as the Third Circuit found, when the vital decisions were made for Sullivan. It is in this sense that the possibility of conflict which counsel perceived and acted upon be-

comes the real conflict. The Third Circuit demonstrated by its conclusions that it understood this distinction. Counsel considered Carchidi and DePasquale's interests in advising Sullivan to forebear a defense. *Commonwealth ex rel Sullivan v. Cuyler, supra,* 522. The lawyer actually understood his conflicting loyalties. That he understood his advice to Carchidi may harm Sullivan, or that giving Fifth Amendment advice to Carchidi may harm Carchidi, is an actual conflict. Similarly the withholding of evidence exculpatory of Sullivan because of the possibility of inculpating Carchidi or DePasquale is an actual conflict.

There is no way to arrive at an understanding of the meaning of conflict of interests standards absent an understanding of the attorney's role in joint representation. The judgmental factors which figure in the critical decisions whether to put on witnesses, whether to mount a defense at all, whether to stonewall a government attack, or on the other hand to meet it head on, are at the heart of our adversary system. An attorney who shackles himself in any way in making these judgments, playing off one interest against the other, is in actual conflict, and this is especially true here where those interests were those of his other clients.

It is difficult to imagine a stronger case of conflicting loyalties. The Sullivan trial can be viewed as a trial balloon for the two attorneys. At least one of these attorneys later acknowledged his improprieties in post-conviction proceedings,[17] as the Third Circuit noted.

[17]Joint representation of all three defendants was found as a matter of law by the Third Circuit. To believe that counsel DiBona had the ability to divorce himself completely from the interests of his other two clients requires believing that he did not recognize the conflicts or that he himself thought such troubled judgments were part of the "price" respondent had to pay for his representation. Neither position is defensible.

The plain facts are that John Sullivan was convicted of double murders on the thinnest of evidence, the issues surrounding which have mixed various courts.[18]

It is unusual to find a record plainly demonstrating that the guiding hand of counsel was in fact guiding the course of the co-defendants. Conflicts of this nature are rarely full-blown upon the record, and all the conflicts cases beginning with *Glasser* and concluding with *Holloway* recognize this fact. *Austin v. Erickson, supra; United States ex rel. Hart v. Davenport, supra.*

Even crediting DiBona's assertion that he perceived no conflict, an assertion which is contrary to that made by Peruto, does not dispose of the troublesome problem fairly encompassed by this record. The record may not reflect all of the temptations faced by counsel in this case. The record may not reflect the possibility that despite altruistic intentions, counsel may have in fact become less zealous. Respondent's right to conflict-free and effective counsel is an outgrowth of his fair trial rights and even possible violations of that right must be examined closely. *Zuck v. Alabama, supra,* 440. Clearly this Court's admonition in *Holloway* must include Sullivan's predicament. The mere presence of his attorneys at his trial does not fulfill the Sixth Amendment guarantee when it may be that his attorney's

[18]The trial court en banc split 2-1; the first Supreme Court of Pennsylvania decision split 3-3 on the sufficiency of the evidence; the post-conviction court authorized a second appeal because of ineffective assistance claims; the second Supreme Court of Pennsylvania decision split 5-2; the Federal magistrate recommended a writ issue; the District Court denied the writ; the three judge panel unanimously reversed; the petition for reargument was denied 6-3. Score: 17 for respondent; 15 opposed.

conflicting obligations effectively seal their lips on crucial matters. *Holloway v. Arkansas, supra,* 489.

Furthermore conflicts ineffectiveness is different in quality from competency effectiveness. As Judge Hill of the Fifth Circuit has noted:

> "Unlike *competency* of representation, where an attorney's conduct may fall anywhere along a continuum ranging from the incompetent to the superlative, conflict-laden representation is not susceptible of such fine gradations. Such representation is invidious, often escaping detection on review, and is tantamount to a denial of counsel itself." *United States v. Alvarez,* 580 F.2d 1251, at 1256 (5th Cir. 1978).

Thus the result reached by the Third Circuit is predicated upon facts which would have led to relief in any circuit, and its standard which requires the mere possibility, however remote, of actual prejudice or conflict of interest is a correct standard where the record is silent and the state bears the burden of establishing the unlikelihood or the improbability of prejudice, and has failed to do so.

Once the conflict appears, as it did in the context of this case, the prisoner has met his initial burden, and it is the Commonwealth who must shoulder the appropriate burden, not the prisoner. Only by shifting the traditional allocation of the burden of proof can the Commonwealth prevail, and in an effort to do so it has torn the language of the Third Circuit, bleeding from its context, in a semantic attempt to convince this Court that this case posits issues which would be resolved differently in different circuits.

If the Court granted certiorari under such an impression, then it should find that certiorari was improvidently granted.

III.

BECAUSE STATE ACTION IS UNQUESTIONABLY PRESENT BY REASON OF JUDGMENTS OF THE STATE COURT IMPOSING CONSECUTIVE LIFE SENTENCES, AND BECAUSE RESPONDENT HAS ADDITIONALLY A SIXTH AMENDMENT RIGHT TO ENJOY THE ASSISTANCE OF COUNSEL, THE REQUIREMENTS OF THE SIXTH AND FOURTEENTH AMENDMENTS HAVE BEEN MET.

Respondent sought and was granted federal habeas corpus relief on the ground that he was held in custody by the Commonwealth of Pennsylvania in violation of the Constitution of the United States, 28 U.S.C. §2254(a). Specifically, his conviction was infected by dual representation which created a prejudicial conflict of interest in his attorneys' representation. As a result he did not "enjoy the right ... to have the Assistance of Counsel for his defense" as guaranteed by the Sixth Amendment.

Petitioner's "state action" argument (Point II of its brief), raised for the first time in this Court, fundamentally misconstrues this constitutional concept. Some provisions of the Constitution are protections of

the individual against the government and others are not. *Flagg Bros., Inc. v. Brooks*, 436 U.S. 149, 155 (1978). The Fourteenth Amendment's due process clause clearly is of the former type, id., and state action as required by the Fourteenth Amendment is present in this case, as in every criminal case, by the State's imposition of judgment on the respondent, depriving him of liberty for the rest of his natural life (twice consecutively). Rather, the only question arguably presented here is whether the Sixth Amendment's guarantee of the effective assistance of counsel, see *McMann v. Richardson*, 397 U.S. 759, 771 n.14 (1970), means what the Sixth Amendment says ("the accused shall enjoy ... the Assistance of Counsel") or instead something quite different and much more limited (e.g., "the court shall not deny or deprive the accused of the assistance of counsel"). This Court has never held that only court or other official action can have the effect of denying an accused his Sixth Amendment right, but instead has rightly focused as the Amendment's language directs, on whether effective assistance was in fact enjoyed. See *Fitzgerald v. Estelle*, 505 F.2d 1334, 1344-46 & n.2 (5th Cir. 1975) (en banc) (Godbold, Brown, Rives, Wisdom & Goldberg, JJ., concurring in part); *United States ex rel. O'Brien v. Maroney*, 423 F.2d 865 (3rd Cir. 1970) (Seitz, J., concurring).

Just as there is no support in the Sixth Amendment's language or in this Court's opinions for reading an "official action" element into claims of denial of the right to the assistance of counsel, so there is no reason or logic behind such an innovation. A slight variation

on the facts of this case suggest the illogic of the proposition. Suppose that X and Y are charged with murder and X retains P to represent him. X then suggests to Y that P represent both at no cost to Y. The unscrupulous P then advises Y to plead guilty and testify on X's behalf, and X is acquitted. The judge and prosecutor know nothing of the scheme, nor could they, as P has done all the talking for both defendants. When Y files his habeas petition and proves these facts, can it reasonably be denied on the ground that the same vices that made the conflict intolerable also made it invisible to the trial court and therefore not subject to correction?

Respondent submits that the state's monopolistic control over the qualifications and discipline of the lawyers who are exclusively permitted to represent before its court persons charged with crime (*see Leis v. Flynt*, 429 U.S. 438, 442 (1979)) most certainly carries with it the obligation to avoid or correct this kind of miscarriage of justice.

That the Commonwealth of Pennsylvania herein asserts that great vitality exists in the retained-counsel/appointed counsel distinction is most troubling.

Initially, the trial court may or may not be on notice of any conflict despite the fact that counsel is appointed or retained Therefore the state's responsibility (as well as the harm to the defendant) is no different in either case.

Furthermore, the fact that counsel is court-appointed and compensated from the state is a meaningless fact in a practical constitutional context. Despite the fact that court appointed counsel are compensated by the state they are completely independent from the state, and in

no stretch of anyone's imagination could they ever be termed agents of the state. Our adversary system would be defeated if such were the case.

This fact is clearly recognized in the federal courts as well, this Court stating in *Ferri v Ackerman*, ____ U.S. ____, No. 78-5981 (decided December 4, 1979) in regard to a state case:

> "Indeed, Congress' attempt to minimize the differences between retained and appointed counsel is more consistent with the view that Congress intended all defense counsel to satisfy the same standards of professional responsibility and to be subject to the same controls."

The issue the Commonwealth raises before this Court is simply whether or not the Sixth Amendment applies to protect respondent Sullivan at all, not whether or not state action is present.

Thus the Commonwealth confuses the concept of state action with the substantive question of whether or not the Sixth Amendment is violated by a conflict of interest on the part of defense counsel when the trial court allegedly is not put on notice of the conflict.

It is to be noted that the distinctions drawn by the Commonwealth herein have never been drawn by this Court, and this Court treated counsel in both *Glasser, supra* (retained counsel) and *Holloway, supra* (appointed counsel) in parallel fashion.

The Chief Justice made the observation ten years ago that "defense counsel who is appointed by the court ... has exactly the same duties and burdens and responsibilities as the highly paid, paid in advance criminal defense lawyer." Burger, *Counsel for the Prosecution and Defense–Their Roles Under the Minimum Standards*, 8 Amer. Crim. Law Q. 1, 6 (1969).

At a time when the American public is fast losing confidence in its attorneys, and at a time when judicial criticism of the trial bar is almost raging, can the Commonwealth of Pennsylvania seriously argue that the Constitution of the United States does not cover those persons who are fortunate enough to have the funds to retain counsel, and any right to reversal due to ineffectiveness or conflicts of interest as to such a class of defendents is nonexistant?

The court appointed attorney is the fundamental right of the indigent. At no time has the source of the fee paid to such attorney been magnified so as to cause a constitutional difference in his accountability as opposed to the accountability of the private defense bar, and any attempt to do so would cause serious equal protection problems. Such attempts have been strenuously resisted on each and every occasion.

The adversary system is the jewel of the trial that comports with due process, and our system promises those accused of crime that a trial will be held. The state's promise of a trial and the awesome machinery of the criminal justice system therein employed at the very least implies that the state is under the obligation to protect such machinery at least to the extent that constitutionally effective representation is afforded to all those who are accused.[18a]

The court itself has the obligation imposed upon it to insure against unintelligent waivers of such fundamental rights as trial by jury as well as in the guilty plea colloquy. See *Boykin v. Alabama*, 395 U.S. 238 (1969).

[18a] "In an adversary system of criminal justice, there is no right more essential than the right to the assistance of counsel." Lakeside v. Oregon, 435 U.S. 333, 341, 55 L.Ed.2d 319, 98 S.Ct. 1091 (1978).

The adversary system itself is a major element of due process of law. This Court so held in *Herring v. New York*, 422 U.S. 853, 857 (1975):

> "More specifically, the right to the assistance of counsel has been understood to mean that there can be no restrictions upon the function of counsel in defending a criminal prosecution in accord with the traditions of the adversary fact-finding process that has been constitutionalized in the Sixth and Fourteenth Amendments."

The break down of the adversary system violates due process of law. Nothing will serve to defeat and debase the adversary system to a greater extent than defense counsel shackled by a secret and invisible conflict of interest.

As an officer of the court, a defense attorney owes a duty to the court not to defeat the adversary system by bringing such conflicts to its bar, especially in this case which was a capital one. The court, on the other hand, *must* bear the responsibility should such an invisible secret conflict later surface due to its responsibility for its officers.

A fundamentally unfair trial results when the defense is burdened by conflicts and the state is the illegitimate beneficiary of same. The promise of the adversary system is broken, and the pursuit of the truth and the proper determination of facts will be hindered significantly. See *Herring v. New York, supra.*

Says the Commonwealth of Pennsylvania, such is the price of retained counsel. Respondent, as earnestly and as strenuously as he can, asserts that that price is far too high, and need not be paid under our Constitution.

If a finding of state action is necessary in order to guarantee respondent his Sixth Amendment rights, then it is more than clear that the trial court in this case knew, or should have known that respondent's attorneys were laboring in a context that was rife with conflict or the possibility of same.

The mere fact that respondent's attorneys made known countless times the fact that they jointly represented all three defendants charged with this crime should have put the trial court on notice that conflicting interests were likely to arise, and a waiver colloquy should have been held with respondent. No such action was taken by the trial court in 1967, and that inaction, standing alone, should be sufficient for this Court to find the hand of the state at work.[19]

Coupled with the obvious joint representation of all three codefendants capitally charged and known to the trial court, is the fact that even prior to the Commonwealth's resting its case, Peruto made clear to the court that Carchidi (represented by both Peruto and DiBona) would not take the witness stand on behalf of respondent.[20]

This, standing alone should have alerted the trial judge and at the very least indicated to it that a

[19]It is a well known fact today, where multiple defendants are jointly represented by private counsel, that trial jurists are careful to obtain a waiver of any conflict which is existent or which may arise during trial. If petitioner is correct in its position that where the trial court is not on notice of any conflict no constitutional right is violated most of these colloquies are meaningless.

[20]It was this conflict that was described by the Third Circuit as requiring reversal "even under a rule requiring prejudice." *United States ex rel Sullivan v. Cuyler, supra.* at 522, 523.

waiver colloquy with the defendant was necessitated. Again, no such action was taken. It cannot be asserted that the very attorneys with the conflict should have taken the action since the conflict locks them in, and was buried deeper. It was, and indeed is, the trial judge upon whom the responsibility rested. His failure to act is again the hand of the state at work, and is state action for purposes of the Fourteenth Amendment since the trial jurist can be said to have participated in a fundamentally unfair trial Cf. *Shelley v. Kraemer,* 334 U.S. 1 (1948).

Again, state action can be found in the plain fact that the state was, and is, the beneficiary of the conflicting interests shared by respondent's attorneys.

As such, the state is the illegitimate beneficiary of same, and should not be allowed to maintain and enforce its judgment of life imprisonment under such circumstances.

This is exactly what the state has done in this case, trying respondent, convicting him, sentencing him, and denying relief throughout these proceedings, refusing to recognize the clear legal implications and vices of the conflicts delineated by the Third Circuit which honored its overriding duty to make its own independent examination of the record as to alleged violations of federal constitutional rights, a duty which rests "on [its] solemn responsibility for maintaining the Constitution inviolate." *Napue v. Illinois*, 360 U.S. 264, 271, 79 S.Ct. 1173, 1178, 3 L.Ed.2d 1217 (1958).

What is particularly egregious is that the record of conflicts and ineffective assistance in this case which began pre-trial and continued through the appellate process in the Supreme Court of Pennsylvania was

compounded by the state court's refusal to recognize and remedy the constitutional violations. The same attorneys represented the co-defendants who were acquitted prior to respondent's sentencing and the filing of his appeals to the Pennsylvania Supreme Court.

Numerous continuances of the appeals were requested by the attorneys. Although Judge DiBona was appointed to the bench of the Court of Common Pleas of Philadelphia in 1969 the docket in the Supreme Court of Pennsylvania does not reflect the filing of a motion to withdraw his appearance as counsel for respondent. In post-conviction proceedings in 1974, Judge DiBona said that prior to his appointment to the bench he did not file a brief on respondent's behalf in the state supreme court. (R., PCHA, 9). Unfortunately for respondent, no brief was filed by Mr. Peruto either. (A. 44a-46a).

The post conviction court entered an order finding ineffective assistance of counsel on these facts. The clients who actually engaged the services of the lawyers no longer needed them, since they were acquitted. Yet the dilemma of respondent's ineffective assistance claims as to which conflicts adhered continued.

The lawyers abandoned him after filing the appeals. These first degree murder cases went unbriefed and unargued. (R., PCHA, 9). To what extent continuances and failure to brief or argue his cases contributed to the three and a half year delay before the Pennsylvania Supreme Court decided the appeals is not of record. However John Sullivan was in prison throughout this time, and the conflicts issues he later raised on post-conviction proceedings were not cognizable by any court until the decision of the Pennsylvania Supreme

Court on December 29, 1971. There is therefore actual prejudice to respondent resulting from the ineffective assistance claims he was forestalled from raising for so many years.

As if these deprivations were not sufficiently egregious, the post-conviction court granted only partial relief (a new appeal), thus impressing a state action imprimatur on a case which already was overburdened with fundamental unfairness. The second appeal prosecuted to the Pennsylvania Supreme Court also resulted in a decision which failed to grant relief. The same perils in conflictive representation which respondent asserted in post-conviction proceedings were invisible in the Supreme Court of Pennsylvania as well.

The Commonwealth of Pennsylvania had numerous opportunities to provide respondent with a fair trial, and to correct what was already a fundamentally unfair trial because of conflicts. Its failure to do so was state action monolithically impressed upon an accused who remained throughout imprisoned as a result of Sixth Amendment ineffectiveness, and no other state action need be shown.[21] *United States ex rel. Hart v. Davenport, supra; Zuck v. Alabama supra* at 439; *United States v. Alvarez, supra*, 256; *Fitzgerald v. Estelle, supra; Stephens v. United States*, 595 F.2d 1066 (5th Cir. 1979); *Porter v. United States*, 298 F.2d 461 (5th Cir. 1962).

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[21]Petitioner's assertion that the Third Circuit erred in even considering respondent's claims, where he was represented by private counsel, is particularly ill conceived. Petitioner herein never raised a state action argument in the District Court or in the Third Circuit, as respondent herein argued in his answer to the petition for certiorari. For the Commonwealth of Pennsylvania to suggest to this Court that once certiorari was granted, respondent should now be foreclosed from replying to the state action argument is too frivolous to require further observation.

IV.

THE THIRD CIRCUIT DID NOT VIOLATE APPROPRIATE LIMITS OF APPELLATE REVIEW, NOR DID IT ENGAGE IN DE NOVO FACT FINDING.

Petitioner attacks the right and the power of the Third Circuit to draw legal conclusions from the record facts developed in the state court hearings. These legal conclusions apply to (1) the question of whether dual representation existed as a matter of law, and if so (2) whether respondent's counsel was burdened with several conflicting interests.

Initially it is important to note that the Commonwealth herein again adopts an inconsistent position in that it vigorously argues to this Court that Peruto's testimony is not worthy of belief, an qrgument abandoned in the Third Circuit. As the Third Circuit stated in *Sullivan, supra* at 522:

> "Respondents do not argue here, as they did in the court below, that Peruto's testimony is unworthy of belief, perhaps because they rely upon it so heavily in support of their contention that there was no dual representation."

Thus, in large part, the Commonwealth has waived this argument.

As to the propriety of drawing legal conclusions from the historical facts of record the Commonwealth asks this Court to give much credit the Pennsylvania Supreme Court's ruling that no dual representation was present in this case.

The record facts found in the state post-conviction hearing by Judge Doty were simply that Peruto and

DiBona were "co-counsel." (Opinion, November 6, 1974).

In ruling that the legal conclusion drawn from the record by the Pennslyvania Supreme Court was both erroneous and not supported by the record, as well as being contrary to the finding of the lower state court, the Third Circuit ruled:

> "The state court [Supreme Court] based its finding that there was no dual representation on its assessment of Peruto's role in petitioner's defense. It concluded that his role was so minor that he was the sole responsibility of Judge DiBona. We believe that an attorney who enters an appearance on behalf of a criminal defendant, consults with him confidentially for the purpose of preparing a defense, investigates his case, aids in the pretrial preparation of his defense, appears at his trial, participates in the selection of the jury that is to decide his fate, argues motions and objections, confers with co-counsel on trial strategy, offers the defendant legal advice, including advice on whether he should testify or present evidence in his defense and argues the issue of penalty, a matter of life and death, to the jury on the defendant's behalf must be said to represent that defendant and owe to him all the duties an attorney ows to a client in a criminal case. We find that Peruto represented Sullivan as well as Carchidi and DePasquale." *United States ex rel. Sullivan v. Cuyler,* supra at 519.

The Commonwealth argues that the Pennsylvania Supreme Court found facts regarding Peruto's testimony that must be considered presumptively correct under 28 U.S.C. §2254(d), but is unable to cite any Pennsylvania case where the Supreme Court found facts in the first instance. To the contrary, Pennsylvania appellate

practice cautions strongly against such a practice by any of its appellate courts, and did so explicitly in this very case. See *Commonwealth v. Sullivan*, 372 Pa. 129, 371 A.2d 468, (1977).

> "... The structure and function of an appellate court precludes it from being an initial factfinder." Cites omitted. *Commonwealth v. Sullivan*, supra, at 475.

The gratuitous conclusion of the Pennsylvania Supreme Court that "absolutely no conflict" existed is just that. By ruling that Peruto's "minor" role was insufficient to sustain a finding of dual representation, the Pennsylvania Supreme Court, focusing solely on DiBona totally eliminated any review of the conflict of interest question posited by this dual representation.

Finding dual representation the Third Circuit then had the power, and indeed the duty, to determine the existence or nonexistence of a conflict under federal standards of right to counsel, a pure question of federal law, which it did so, contrary to the hopes of the Commonwealth.

Federal Courts on habeas petitions have the singular duty to make an independent study of the record before them to determine whether or not the state court conclusions are supported therein. See *Neil v. Biggers*, 409 U.S. 188 (1972); *Dodge v. Johnson*, 471 F.2d 1249 (6th Cir. 1973); and are "in no way foreclosed ... by the fact that the state trial judge or the jury may have reached a different result on this issue." *Haynes v. Washington*, 373 U.S. 503, 515 (1963).

It is painfully obvious here that the Third Circuit considered the record, rejected the legal conclusion of the state appellate court that no dual representation was presented, found itself obliged to determine Peruto's legal status vis a vis respondent, found that the Commonwealth, before them, did not argue that Peruto was unworthy of belief and indeed relied heavily upon his testimony itself, and further did not dispute his of record advice to respondent.[22] Having the right, the power, and the duty to review the record independently for errors of federal law applied to the factual context of this case, it can be said without cavil that the conclusions of the Third Circuit were "justified." See *Neil v. Biggers*, 409 U.S. 188 at 193, n.3, (1972) citing *Boulden v. Holman*, 394 U.S. 478 (1969).

The alleged dispute herein is, as it was in *Neil v. Biggers*, supra. "... not so much over the elemental facts as over the constitutional significance to be attached to them."

Measured by the of record trial activity Peruto engaged in during Sullivan's trial the Third Circuit's application of federal law compels the conclusion that dual representation was present, and significantly even the dissenters from the petition to reargue this case also so found, making this decision unanimous. ("Hence, I agree with the panel that Sullivan presents a case of dual representation." *Sullivan, supra* at 525.)

The trial record alone reveals that Peruto, qua

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[22]This flowed inexorably from the Commonwealth's argument that regardless of what affected the judgment of respondent's attorneys, they were retained by him and that there was no conflict at all—a position the Commonwealth maintains to this day.

Sullivan's attorney, investigated the case, entered his appearance, helped voir dire and select the jury, presented innumerable arguments to the trial court,[23] informed both court and jury that the defense had been entrusted to him resting without presenting any evidence, and finally, made respondent's speech in opposition to the death penalty.

Moreover, to Sullivan, Peruto was one of his attorneys. Indeed, if the quesiton arose in the different context of whether or not an attorney client privilege existed between Sullivan and Peruto no court would, or could, rule that DiBona was Sullivan's sole attorney or that dual representation was not present here.

Federal Courts have long had the power, and indeed the duty, to correctly apply legal standards to erroneous state court conclusions of federal law. See *Fay v. Noia*, 372 U.S. 391 (1963), and 28 U.S.C. §2254.

It is crucial to note herein that once the Pennsylvania Supreme Court ruled that no dual representation existed it then ruled that DiBona's testimony that he "was in no way affected by the considereation of the co-defendant's cases ..." was dispositive. *Commonwealth v. Sullivan*, 472 Pa. 129 371 A.2d 468 at 483 (1977).

In holding that "... there is absolutely no evidence that a conflict existed" *Commonwealth v. Sullivan*, supra at 483, the Supreme Court of Pennsylvania so

[23]These can be found in the trial records at: May 17, 1967, 48-57; June 7, 1967, 7-53; 74-76, 121-125, 149-157; June 8, 1967, 170, 173-175; June 13, 1967, 666-672, 658; June 14, 1967, 720-729, 808-809; June 15, 1967, 934-947, 1000-1010, 1064-1066, 1072-1081; June 16, 1967, 1094-1131; June 18, 1967, 1139-1140, 1228-1230, 1247-1267, 1278-1280.

found *only* because it had eliminated Peruto from any consideration of any conflict.

Thus, the Third Circuit did not act inconsistently with the rationale of the Pennsylvania Supreme Court or find *de novo* facts herein, but did correctly apply a federal legal standard to the undisputed and unchallenged facts of record which had been erroneously construed by the state's highest court.

The Commonwealth next launches an argument to this Court asserting that the Third Circuit transgressed appropriate appellate review in crediting Peruto's testimony concerning the conflicts.

The Commonwealth's brief laments:

> "... the Third Circuit *sua sponte* credited Peruto's assertions regarding his tactical suggestions and his motivation, and indeed accorded them dispositive weight, simply because '[n]o reason or evidence is offered to explain why an attorney would make [this] damaging admission of professional impropriety ... were it not true.' " (Petitioner's brief, at page 43).

The Commonwealth does not quote that portion of the opinion which points out who strategically offered "no reason or evidence" to dispute Peruto's testimony:

> "Respondents do not argue here, as they did below, that Peruto's testimony is unworthy of belief ..." U.S. ex rel. Sullivan v. Cuyler, at 522.

As such, it ill becomes the Commonwealth to juggle its position when it requested no hearing on this habeas petition, was content to rely on the record, and invited the Third Circuit to credit Peruto's testimony concerning the dual representation issues.

The Commonwealth next argues to this Court that

the appellate vice it discerns must result in a remand solely because questions of elemental fact concerning whether counsel Peruto "ever in fact advised against presenting a defense, and if so whether that advice was in fact motivated by a concern for the other two co-defendants, were just that–questions of basic and elemental fact, properly answereable only by a hearing court afforded the opportunity to observe the witnesses and to evaluate his ability to remember and his credibility." (Petitioner's brief, page 43).

Upon this slim reed rests the Commonwealth's entire argument that the Third Circuit "transgressed appropriate limits of appellate review by making *de novo* findings of fact . . .".

The record is more than clear that Peruto did in fact advise against any defense and that such advice was motivated by his concern for the conflicting interests of his other two clients.

[By Peruto:]

"A. Yes. I can recall the great discussions that we had with Sullivan where we were so convinced that–and we communicated this to Sullivan–

[The Court:]

"When you say great discussion you mean lengthy discussions?"

[The Witness:]

Lengthy discussion, yes, sir. Where we felt that he couldn't possibly be convicted and, therefore, what's the sense in exposing the defense because we had two more defendants to try."

[By Defense Counsel at Post-Conviction Hearing Act Hearing:]

"Q. Wait–

"A. And I'm afraid Sullivan suffered by that fact.

"Q. Wait just a minute, sir. You were concerned with the other two defendants you represented; is that correct?

A. Yes. Why expose your defense if you've got two more people to come to trial and the Commonwealth has not presented a case?

Q. So that entered into your consideration as to whether or not you presented a defense in the Sullivan case?"

A. Sure, it did. When we're talking about back and forth. For example, I've heard Judge DiBona testify today, and, yes, we were sort of playing devil's advocate. I didn't want the defense to go on because I thought we would only be exposing the defendant [sic] witnesses for the other two trials that were coming up. Now on the other hand, you see, the three defendants had already decided between themselves which of us they wanted to be chief counsel. John Sullivan picked Fred DiBona, the other two defendants picked me. So certainly I had to be chief counsel and face the trial of the other two men. And as I look back on that, although it was not my thought that John Sullivan should be short-changed in any fashion, I'm afraid that it was my thought that I was over-solicitous for the other two defendants being ready to be tried." (A. 65a-58a).

Moreover, this too was not subject to dispute in the Third Circuit which ruled:

"It is undisputed that Peruto participated in the decision not to present a defense." *Sullivan*, supra, at 522.

The unique issue herein posited–the detrimental

effect of respondent's being represented by attorneys whose interests were divided, whose judgments were clouded in the context of this case with concerns for other defendants yet untried and the clearly erroneous state court ruling that dual representation did not exist left the record in such a state that no fact was in dispute as to the conflicts that burdened counsel. Peruto's testimony concerning the conflicts is uncontradicted, comes from an officer of the court, was not challenged as being unworthy of belief in the Third Circuit and his actions vis a vis Sullivan as to his advices not to take the stand or present a defense, and his posture qua co-defendant Carchidi, are not disputed.

In conformity with *Townsend v Sain*, 372 U.S. 293 (1963) and 28 U.S.C. §2254(D)(1) the Third Circuit corrected an erroneous state law ruling as to federal constitutional law, found no facts in dispute, and appropriately resolved conclusions of law which had not been resolved in the state courts after such remedies were exhausted. A remand would, in the context of this case, serve no purpose.

V.

THE LIKELIHOOD THAT CONFLICTS OF INTEREST WILL OCCUR WHENEVER AN ATTORNEY REPRESENTS MULTIPLE CLIENTS IS SO GREAT THAT A PROPHYLACTIC RULE PROHIBITING JOINT REPRESENTATION SHOULD BE ORDERED BY THIS COURT.

Arguments I and II demonstrate ineffective assistance of counsel and a fundamentally unfair trial grounded on

flagrant conflicts of interest, at least one instance of actual prejudice and a silent record as to any conflict or waiver of separate representation. There is therefore no issue before this Court which warrants reversal of the Third Circuit's grant of habeas corpus relief to John Sullivan.

Although petitioner argues that little more than joint representation supported the Third Circuit's order, petitioner misperceived the findings of the circuit court firmly secured upon substantial evidence of conflicts and prejudice. The record of respondent's case, however, is so unusual in its demonstration of the hazards of joint representation that it may be now appropriate to consider the benefit of a better-late-than-sorry prophylactic rule which does in fact prohibit joint representation *per se*.

A. The Courts are unable to fulfill the constitutional obligation to protect the rights of defendants who are jointly represented.

Glasser v. United States, supra 465, recognized the weighty obligation of trial judges to see to it that the essential rights of the accused in a criminal trial are protected. Among these rights, fundamental and essential to a fair trial, is the Sixth Amendment right to the effective assistance of counsel. *Gideon v. Wainwright*, supra, 342; United States Constitution, Amendments VI and XIV. The lower courts since the holding in *Glasser* have formulated and the appellate courts have reviewed, standards for assuring the fulfillment of the Constitutional obligation. Where the lower court requires the trial judge to inquire into a defendant's understanding of his right to be separately represented,

the court may request that the defendant waive objection to joint representation.

The appellate courts reviewing these inquiries and waivers examine the record also to determine whether despite these safeguards a conflict of interest adhered unconstitutionally to representation.

Where inquiry is not mandated but merely suggested, or where no inquiry component is formulated, the focus of appellate review is also upon the conflict or prejudice which the record demonstrates. The difficulty in articulating standards for evaluating when a conflict of interest arises has occupied trial and appellate courts and has spawned a substantial body of opinions which admit of little consistency. (See Argument II).

As a general proposition the mere fact that two or more defendants are represented by the same attorney should alert the trial judge to the possibility that their interests are conflicting and should prompt an inquiry of some sort. *United States v. Truglio*, 493 F.2d 574, 579 (4th Cir. 1974). Whatever is the nature of the inquiry, it should come at the earliest stage of the criminal justice process. *United States ex rel. Hart v. Davenport*, supra, 210; *United States v. Lawriw*, 568 F.2d 98, 103, (8th Cir. 1978), *cert. denied*, 435 U.S. 969 (1978).

The issue however is not only whether the judge has, or perceives that he has, a duty to inquire into joint representation, but also what function that inquiry serves and can be expected to serve. If the function of the inquiry is to protect a defendant's right to effective counsel by assuring conflict-free counsel, the trial judge would be required to ask the defendant what his defenses are, what advice he has received from his

attorney as regards proof, whether his co-defendant intends to assert the same defenses, whether inculpatory statements were given by his co-defendant which implicates him, whether the backgrounds of the jointly represented defendants are similar or dissimilar. There are few "facts" in the abstract which can inform an intelligent inquiry. The court cannot, and should not attempt to, conduct a searching colloquy which remains consistent with a defendant's Fifth Amendment privilege against self-incrimination, the attorney-client privilege, and the potentiality that a perjury charge may be brought if the defendant's testimony differs from trial testimony.

Furthermore the realities of criminal trials are such that superficial statements or questions by the trial judge, and monosyllabic answers by the defendants, do not safeguard constitutional rights. The right sought to be protected by inquiry is the right to have the undivided loyalty of an attorney who is in a position to give it. A warning by the court that a defendant has the right to separate counsel is a recognition that separate counsel is a predicate to Sixth Amendment effectiveness.

If on the other hand the function of the inquiry is to obtain a waiver of a defendant's right to separate counsel, the defendant must first know and understand the right he is being asked to surrender. The fact that he needs a lawyer may not be difficult to understand. It may also appear economically reasonable to be represented by the same lawyer who represents a co-defendant similarly charged The ability to predict problems involving trial preparation and trial advocacy where he shares the same attorney is not always

possible, even for the attorney. Infinitely more difficult would such a decision be for the average defendant standing before the trial judge.[24] The guiding hand of the attorney *whose conflict is being scrutinized* is essential to the defendant's decision to waive joint representation. Under the circumstances the attorney is in a different kind of conflict if he should offer his advice, and his advice is vital at this juncture. The *Johnson v. Zerbst*, 304 U.S. 458 464 (1938) waiver of the essential right to counsel cannot be made where, as here, a defendant does not truly comprehend the right he is waiving, is advised to waive it by one who at that juncture operates in a new conflict-laden area, and where he contemplates giving up something which may not yet have occurred. He may do so without ever knowing what trial strategy was lost or plea bargain shelved. *United States v. Garafola*, supra, 623; *United States v. Dolan*, supra, 1182 Lowenthal, *Joint Representation in Criminal Cases: A Critical Appraisal*, 64 Va. L. Rev. 939, 971 (1978); Geer, *Conflicts of Interests and Multiple Defendants in a Criminal Case: Professional Responsibilities of the Defense Attorney*, 62

[24]"It would be a rare defendant who could intelligently decide whether his interests will be properly served by counsel who also represents another defendant. However parallel his interests may seem to be with those of a co-defendant the course of events in the prosecution of the case, the taking of a guilty plea, or the conduct of the trial may radically change the situation so as to impair the ability of counsel to represent the defendant most effectively. Even defense counsel, who all too frequently are not adequately informed regarding the evidence available against their clients, may not be in a position to judge whether a conflict of interest between their clients may develop." *United States v. Carrigan*, 543 F.2d 1053 (2nd Cir. 1976) at 1058.

Minn. L. Rev. 119, 141 42 (1977).

Under such circumstances, asking a defendant to give up a valued right fundamental to fair trial is in itself fundamentally unfair. The likelihood is great that such a waiver may be obtained from an accused in order to support a standard requiring a heavy burden of demonstrating prejudice on appeal. Judge Lacey's assessment of the function of an inquiry into joint representation is stated as follows:

> "The trial judge is placed in a difficult position when, at arraignment, he is confronted with joint representation by defendants' counsel. The *Davenport* inquiry, by and large is an ineffective charade. The judge and counsel know the purpose of the inquiry: to forestall a convicted defendant from later successfully urging on appeal that he did not at trial have effective assistance of counsel. Put in other words, it is done to construct a predicate for claiming later that there has been a waiver of a constitutional right. For reasons I shall explicate, it fails utterly as a means of assuring an informed consent from jointly represented–and unsophisticated–defendants. *United States v. Garafola*, supra at 623.

While inquiry into possible conflicts of interest, however inappropriate or ineffective, appear on the record for the benefit of the reviewing court, an underlying conflict of interest in joint representation is unlikely to surface on review. The selection of defenses and mapping of strategy which occurs before a case comes to trial, never appear upon the record. Counsel for a single defendant may have the opportunity to exercise free choice in charting the defense; joint representation usually labors under the demands of

multiple defenses, connected by the "united we stand, divided we fall" stratagem. Conflict of interest (unreported for appellate review) arises in the lawyer's office, or the jailhouse in the court of selecting strategy, rather than in the courtroom recorded by the stenographer. *Stephens v. United States*, 595 F.2d 1066, 1068 (5th Cir. 1979); *Austin v. Erickson*, supra, 625-26, citing to *Commonwealth ex rel. Whitling v Russell*, 406 Pa. 45, 176 A.2d 641 (1962); *United States v. Lawriw*, supra, 105.

The likelihood that the courts in fact safeguard the right of a defendant to enjoy the assistance of counsel is marginal where counsel also represents a co-defendant.

B. Where the courts have looked to members of the bar to bear the responsibility of insuring that the Sixth Amendment is not violated, that expectation is unfulfilled.

Can the lawyer wear two hats at one and the same time? It is hardly frivolity to suggest that an attorney who faces the reality of offering undivided loyalty to a client cannot give 100 per cent of his loyalty to *two* clients. There appears always to be the possibility that the interests of defendants jointly represented may become "conflicting, inconsistent diverse or otherwise discordant."[25]

[25]"Maintaining the independence of professional judgment required of a lawyer precludes his acceptance or continuation of employment that will adversely affect his judgment on behalf of or dilute his loyalty to a client. This problem arises whenever a lawyer is asked to represent two or more clients who may have differing interests, whether such interests be conflicting, inconsistent, diverse, or otherwise discordant. ABA, Code of Professional Responsibility, EC 5-14.

The ethical obligation specifically demanded of all attorneys is to refrain from representing multiple clients with differing interests because there are few situations where he would be justified in risking conflict.[26] One Circuit has codified the ethical obligation of attorneys as respects conflicts of interest by requiring adherence to "ethical standards with respect to avoidance of conflicting interests as is generally expected from the bar." *United States ex rel. Hart v Davenport, supra*, 210.

The experience of public defenders has prompted a recent report that 70 per cent of those attorneys who responded to a survey had strong preferences for separate rather than multiple representation. Lowenthal, *supra*, 950. The reason assigned most frequently for the opposition to joint representation in this group of attorneys is the widespread belief among them that the interests of co-defendants conflict in virtually every case.

It is more than obvious that attorneys representing multiple clients cannot foresee conflicts which may arise. Neither defenses nor strategy remains static. That which pretrial may appear certain may dissolve when the jury is sworn. A defendant may withhold information or be misinformed, a missing witness may be located, or the government may offer a plea bargain.

[26]"If a lawyer is requested to undertake or to continue representation of multiple clients having potentially differing interests, he must weigh carefully the possibility that his judgment may be impaired or his loyalty divided if he accepts or continues the employment. He should resolve all doubts against the propriety of the representation. A lawyer should never represent in litigation multiple clients with differing interests. . . ." ABA, Code of Professional Responsibility, EC 5-15.

An alibi requires investigation or evidence develops tending to prove the crime was committed by someone else. The range of possible conflicts which may arise if the attorney also represents a co-defendant whose alibi conflicts with that of the other client, or whose background is different, or whose actual complicity may be greater or lesser is infinite. A defendant is entitled to "... a vigorous advocate having the single aim of acquittal by all means fair and honorable ... [not] hobbled or fettered or restrained by commitments to others." *Porter v United States*, 298 F.2d 461, 463 (5th Cir. 1962).

The plain meaning of the ethical obligation is to refrain from multiple representation because of the great likelihood that joint representation in and of itself will create a conflict of interest. Judge Lacey in *United States v. Garafola*, supra, 628 annexed to his opinion a form which he suggested should be filed by counsel in every case of multiple representation. The promise exacted of an attorney under such circumstances is to fulfill his ethical obligation by giving the court assurances that there is no conflict of interest. Recognition must be given to the probability that even if these assurances can be given counsel may be unwilling or unable to foresee developments which require changes in strategy. *United States v. Mari*, 526 F.2d 117, 119-121 (2nd Cir. 1975) (Oakes, C. J., concurring.)

The possibility that an attorney representing more than one client similarly charged may be called upon to make choices between the interests of his clients looms at every stage of the criminal proceeding from the moment he is retained to the end of the trial. Simply

to define the nature of the relationship of counsel with his client raises grave questions about the dangers inherent in multiple representation. What is the hazard in joint representation that prompts trial judges to inquire of a defendant whether he waives his right to separate counsel? To put the question is to suggest the answer. It is that some strategem of the attorney will adversely affect the interest of one defendant while advancing the interest of the other.

Rule 44(c) of the Federal Rules of Criminal Procedure provides:

> "Whenever two or more defendants have been jointly charged pursuant to Rule 8(b) or have been joined for trial pursuant to Rule 13, and are represented by the same retained or assigned counsel or by retained or assigned counsel who are associated in the practice of law, the court shall promptly inquire with respect to such joint representation and shall personally advise each defendant of his right to the effective assistance of counsel, including separate representation. Unless it appears that there is good cause to believe no conflict of interest is likely to arise, the court shall take such measures as may be appropriate to protect each defendant's right to counsel."

While one aspect of the Rule is clear, i.e., that the requirement of an inquiry by the trial court will now be uniform in the federal courts, other aspects are murky. The Rule by definition is implicated only after the cases are joined for trial, and consequently no inquiry need be made during the critical pretrial stage when conflicts of interest are likely to flourish. This includes by definition confidences of multiple defendants, investigations and interviews of witnesses

consciously or subconsciously geared to accommodate the exchanged confidences, and fee arrangements.

Moreover, the Rule does not define conflict of interest nor offer suggestions as to how to analyze the role of counsel who provides joint representation. In perpetuating the requirement of inquiry by the trial judge, it is regrettable that no standards as to conflicts are set. As has been noted in Subsection A of this Argument, the judge simply cannot, consistent with his judicial role, and with the Constitutional rights of the defendants, inquire sufficiently to obtain the information he seeks–if indeed it is obtainable. The exacting requirements of the inquiry and the locating and defining of conflicts are the principal sources of asserted error assigned on appeal, and Rule 44c is not likely to correct this problem. This conclusion is buttressed by the fact that the inquiry is not mandated, and may be subject to review on appeal.

In *Holloway v. Arkansas*, supra, this Court gave expression to the aspirational tradition that a lawyer, who perceived the contraints of joint representation, would advise the court of these constraints. It was Holloway's lawyer who perceived the conflicts of interest and who alerted the trial judge. This Court reversed not because joint representation should have alerted the trial judge but because the ethical obligation of the lawyer, satisfied by notice of conflict, became the proof of conflict. Rule 44c does nothing to enforce the ethical obligation, which clearly ought to be enforced in every ca e. A case by ca:e inquiry into potential conflicts will continue to be an ineffectual method of assuring an accused, the court and society of the undivided fidelity of an attorney to his client.

Although it may well be said that an accused has the right to choose his attorney and thereafter waive any conflict, such right of choice should never result in an accused, in effect, dictating that a court compromise its adversary system so as to accomodate him. Such compromises should not be gained under the guise of right to counsel.

Joint representation is and always will be an accommodation to the defense bar. The risk that constitutionally effective representation may continue to be undercut by joint representation is an unacceptable risk. It is a risk that should not be shouldered by defendants, by lawyers, by judges, or by society as a whole. The time has come for a rule promulgated by this Court prohibiting multiple representation.

CONCLUSION

For all of the foregoing reasons, it is most respectfully submitted that the judgment of the Third Circuit Court of Appeals be affirmed.

Respectfully submitted,

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